# No. 12,596

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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CHAN SHING HO, also known as Jack Chan,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

## APPELLANT'S OPENING BRIEF.

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**A STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THE DISTRICT COURT HAD JURISDICTION AND THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.**

This is an appeal from a judgment against the appellant in the United States District Court for the Northern District of California upon a verdict finding the appellant guilty of violations of 26 U.S.C.A. 145 (b) (Income Tax Evasion). (R-1 p. 10.) The charges are in one indictment containing four counts. (R-1 p. 2.)

The first count charges that on or about the 15th day of March, 1944 the defendant Chan Shing Ho,

also known as Jack Chan (and hereafter referred to by his American name) "did wilfully and knowingly attempt to defeat and evade a large part of the income and victory tax due and owing to the United States of America for the calendar year 1943, by filing and causing to be filed with the Collector of Internal Revenue for the first Internal Revenue Collection District of California at San Francisco, California, a false and fraudulent income and victory tax return wherein he stated that his net income for said calendar year, computed on the community property basis, was the sum of $3,384.00 and that the income and victory tax due and owing thereon was the sum of $429.93, whereas as he then and there well knew, his net income for the said calendar year, * * * was the sum of $11,105.15, upon which said net income he owed the United States of America an income and victory tax of $2,773.19."

The second count pleaded, in essentially the same language, the same offense for the year 1944, excepting that "victory tax" is deleted, a joint income tax return was filed, the declared net income alleged was $3,903.22, the declared tax owing was $327.73, whereas the claimed income was $16,507.65 and the claimed income tax, $4,513.51.

The third count was the same for the year 1945, as count two, excepting that a separate return was filed by the defendant, the declared net income alleged was $5,305.63, the declared tax, $611.41 and the claimed actual income was $8,216.01 and the claimed tax, $1,387.64.

The fourth count was the same for the year 1946, as count three, excepting that the declared net income alleged was $6,849.09, the declared tax, $766.46, the claimed actual income was $16,582.30 and the claimed tax, $3,876.36. (R-1 pp. 2-4.)

The verdict of the jury was guilty of all four counts. (R-1 p. 6.) The appellant was sentenced to imprisonment for a period of one year and one day and that he pay a fine to the United States in the sum of $7,500.00 on count one; for imprisonment for one year and one day on count two; for imprisonment for one year and one day on count three; for imprisonment for one year and one day on count four; that the periods of imprisonment imposed on the defendant on counts 2, 3, and 4 commence and run concurrently with the period of imprisonment imposed on the defendant on count one. (R-1 pp. 8 and 10.)

The United States District Court for the Northern District of California had jurisdiction under the provisions of 26 U.S.C.A. Sec. 145 (b) and 18 U.S.C.A. Sec. 3231.

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under the provisions of

28 *U.S.C.A.*, Sec. 1291.

Upon conclusion of the case of the prosecution, defendant moved the Court for a judgment of acquittal upon the grounds of the insufficiency of the evidence, principally, a failure to establish the *corpus delicti* save and except by extrajudicial admissions of the

defendant, and an improper application of the so-called "net worth-expenditure" method of proving income tax evasion. (R-2 p. 296, line 7.)

After the verdict and within the time allowed by law appellant moved the Court for a new trial upon all the grounds now urged on this appeal and others. (R-1 p. 7.) The motion was denied and appellant was sentenced as above stated. (R-1 p. 8.)

Thereafter appellant duly filed his notice of appeal from said judgment against him within the time prescribed by law. (R-1 p. 12.)

Thereafter, and within the time prescribed by law, appellant filed and served his designation of the record to be sent up on appeal (R-1 p. 15) and thereafter and within the time prescribed by law, appellant filed and served a statement of points upon which appellant intends to rely on appeal. (R-1 p. 16.)

Thereafter and within the time prescribed by law and by order of said United States District Court, the record in this case, including the transcript of all testimony and all exhibits separately and directly certified, was filed with the clerk of this Court together with a statement of points to be relied upon on appeal.

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**STATEMENT OF THE CASE, PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.**

As stated above, appellant was convicted of income tax evasion in wilfully and knowingly filing false and

fraudulent individual returns in each of the years 1943, 1944, 1945 and 1946.

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THEORY OF THE PROSECUTION.

Appellant in all of said years, and for many years theretofore, had been the manager of a meat market known as the Palace Market at 816 J Street, Sacramento, California. Admittedly this was owned and operated by a business partnership consisting of 20-25 Chinese or Chinese-Americans, until the year 1941.

It was the contention of the prosecution that in 1941 a meeting of the partners had been held and at this meeting the partnership had been dissolved and that immediately thereafter appellant Jack Chan had bought all of his other partners out and thereafter had owned and operated the business as an individual.

It was the further claim of the prosecution that, after the alleged dissolution of said partnership, and the purchase of said partners' interests, appellant, for purposes of income tax evasion, continued to list his allegedly "former" partners, and their interests in his partnership returns for the years 1943, 1944, 1945 and 1946, paying income tax only on his own claimed share and wages.

To establish this theory, the prosecution relied entirely upon claimed extrajudicial admissions, all of which could be capsuled into a statement made by appellant to two special agents of the Internal Revenue Department that: " '41 all partners, everybody

dropped out of business'' and ''since 1941 business all mine'' and ''now business mostly mine''.

The prosecution then prepared and presented ''balance sheets'' based upon the so-called ''net worth-expenditures'' method. These were offered in the following way:

(1) Special agent C. L. Englund first testified that the books and records of the appellant were inadequate because:

(a) they were in Chinese and the government's interpreter had said that he could not speak the particular dialect in which they were written, and also

(b) certain columns of figures did not have descriptive columnar heads and therefore the agent could not read them without explanation by the taxpayer.

(2) Special agent Englund then presented a balance sheet showing assets and liabilities as of January 1, 1943 (the beginning net worth) based entirely and in all essential details upon what he said the appellant had told him that his assets and liabilities were—and, of course, assuming that the business belonged entirely to appellant and that appellant's partners had no interest therein;

(3) In the same manner balance sheets for each of the years of the period 1943-1946 were ''constructed'';

(4) The agent then testified that appellant had told him that he had received no gifts and made no loans during the period, based upon which assumption the agent classified all increase in net worth as income;

(5) Another agent computed the tax, based upon all these assumptions;

(6) The assumptions, reduced to writing, were then circulated among the jury to be held by them and taken home and studied throughout a trial which lasted from Wednesday, April 5, 1950 to Thursday, April 20, 1950.

Upon the conclusion of plaintiff's case, defendant moved for a judgment of acquittal upon the grounds hereinabove noted (supra, p. 3). This motion was denied.

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**THEORY OF APPELLANT.**

The evidence of appellant showed:

**With reference to the dissolution of the partnership.**

(1) That only two meetings of the partnership had been held, one on July 28, 1940, and the other October 20, 1940. Minutes of these meetings were introduced. No meeting was held in 1941. No negotiations or action was ever taken by the partners collectively, or any portion of them, or individually, to dissolve the partnership. In 1945-1946 appellant did buy out certain partners; and later completed the purchase of the other partners' interests.

(2) Four of the partners (all who were available), including Chan, testified there had been no dissolution, no purchase of their interests, excepting as disclosed by the partnership returns.

(3) Written agreements of purchase and sale of the partnership interests of two of the partners were introduced in evidence. These showed purchases in 1945 and 1946.

(4) Letters from partners were introduced showing they were still partners in 1947 and opening negotiations for the purchase of their shares.

(5) The following was shown with reference to the statement made by appellant to the agents, " '41 all partners, everybody dropped out of business":

(a) That between 1939 and 1941 and principally in 1941 many of the working partners had in fact "dropped out of the business" in the sense that they had quit their employment with the Palace Market and opened businesses of their own;

(b) That when the partnership had commenced to make money, during the war, appellant, who had theretofore "carried the partnership over the lean years, commenced to overdraw his salary, "borrowing" without authorization from his partners and with this money he acquired the assets—a home and the store building—in his own name; these being the assets to which the prosecution pointed in support of its theory that there was unreported income. When questioned about this by the special agents appellant became "scared".

(c) In several other places in the very same statement in which appellant had said " '41 all partners, everyone dropped out of business" he also said "in '46 have ten partners" and similar statements.

(d) A few days after the sworn statement had been made and given to him for correction, appellant did correct it and wrote into the statement "1946, 10 partners J.C."

**With reference to the claimed "inadequacy of the books" the defendant's evidence showed.**

(1) That appellant kept a complete set of "single entry" books in which all items of receipts and disbursements were kept, partly in English and partly in Chinese;

(2) That there is only one Chinese written language irrespective of dialects;

(3) That translated summaries were offered to and received by the special agents;

(4) That he had all cancelled checks; every bank statement; all check stubs;

(5) That these books and records were complete for every day in the year during every year of this period;

(6) That appellant offered every possible cooperation throughout the investigation, submitted to 20 interviews, delivered all of the books and records to the agents, all the cancelled checks, bank statements, translated summaries, had an audit made and turned the audit and the work sheets over to the government.

**As to the facts included in the "balance sheet" prepared by the special agents and based wholly upon what the agent said that appellant had said were his assets.**

(1) The defendant showed that, of a total declared assets of $27,937 as shown on the beginning net worth statement prepared by the prosecution and submitted to the jury, one item, $22,009.50, was wholly fictitious, another $1,000.00 for home furnishings was overvalued, $3,600.00 of accounts receivable were omitted, $12,758.24 of money owed by the partnership to the taxpayer was omitted, life insurance of a value of $4,172.62 was omitted; that of $28,700.00 of total liabilities stated, $1,300.00 were liabilities of the partnership, and $27,400.00 were obligations which the evidence (in large part written agreements) showed were not owed until 1945-1947;

(2) That in the balance sheets for the other years of the period the same mistakes were carried through the computations of the government agents;

(3) That instead of the large amount of unreported income as contended by the prosecution the total unreported did not exceed $3,693.97;

(4) That there was no evidence whatever that the failure to report this amount was wilful but on the contrary, it was due to mistakes quite common in common tax accounting such as (a) the inclusion of partners' salaries as expenses of the business; (b) the listing of certain capital expenditures as repairs.

## SPECIFICATION OF ERRORS.

The appellant makes the following specification of errors and states the following points upon which it intends to rely on the appeal:

"(1) That the trial Court erred in denying Appellant's motion for a judgment of acquittal made at the conclusion of the Respondent's evidence;

(2) That the verdict of the jury was contrary to the weight of the evidence;

(3) That the verdict of the jury was not supported by substantial evidence;

(4) That the court erred in denying the Appellant's motion for a new trial;

(5) That the court erred in overruling objections by Appellant to questions addressed by Respondent's attorneys to the witnesses C. L. Englund and Mrs. J. F. Devine, which questions related to extrajudicial admissions claimed to have been made by the Appellant and which were asked and answered without any proof (other than such purported admissions) that a crime had been permitted either before or after such questions were asked and answered."

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## QUESTIONS PRESENTED IN THIS CASE.

(1) Was it necessary for the Government to prove the dissolution of the partnership in this case?

(2) If it was, is a phrase in a "sworn statement" made by the appellant in 1948 that "41 all partners,

everybody dropped out of business" etc. proof of that fact where in the same statement he also said five times that there were still 10 partners in 1946 and where the facts showed that during the period the working partners ceased working for the business?

(3) Assuming that this is an "extra judicial admission does the prosecution sustain its burden of proof by introducing such statement, and similar oral statements alleged to have been made by the appellant to the agents without any corroborating proof of other facts whatever showing such dissolution?

(4) Assuming that such evidence is sufficient to establish a *prima facie* case, is the evidence sufficient to support a verdict where (a) the minute book of the corporation (b) the testimony of all partners (c) letters written by partners (d) written agreements of purchase and sale, all show that there *were no facts* from which a dissolution of a partnership could be found?

(5) May the prosecution prove a tax evasion case by balance sheets prepared by the "net worth-expenditures" theory, based entirely on claimed extra-judicial admissions of appellant, if the books of the appellant are available and "adequate"?

(6) Are such books inadequate and may they be disregarded and cast aside by the agents in favor of extra-judicial statements merely because they are (a) written in Chinese and (b) because one of the columns is not labeled but where the explanation of the figures was readily obtainable?

(7) Is a balance sheet showing beginning net worth in a case presented on the "net worth-expenditure" method where said balance sheet relies entirely upon extra-judicial admissions of the accused?

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## STATEMENT OF FACTS.

### HISTORY OF APPELLANT AND ORIGIN OF PARTNERSHIP; CHANGES IN MEMBERSHIP; BUSINESS CONDUCTED.

The defendant Jack Chan was born in China. He came to this country in 1913. He is 61 years old, married and has eight children. His schooling was limited to four years in China, where he learned to speak some English (R-2 p. 303, lines 2-12.) When he arrived in this country he went to Sacramento and was a member of a partnership in a butcher shop, his partner being Wing Lee. This was in 1913. (R-2 p. 304, line 7 to p. 305, line 14.)

In 1923 he left this partnership and opened the Palace Market, a meat market, which is the business involved in this proceeding. The business at the outset was a partnership and there were twenty partners. Chan's original investment in this partnership business was $2,000.00 which he obtained by selling out his interest to Wing Lee in the old partnership. The total capitalization of the partnership of the Palace Market was $25,000.00. Thus Chan's interest was 20/250th. (R-2 p. 305, line 25 to p. 306, line 25; R-2 p. 317, line 1.)

There was a written partnership agreement dated September 8, 1923, which appears in evidence (Defendant's Exhibit F, R-2 p. 316, line 11) with its translation.

Twenty-five partners were named in the original partnership agreement and the interest of each is stated. Jack Chan, the appellant, is listed under his Chinese name, Chan Shing Ho. (He is also sometimes called Chan Jock Wei or Chan Jock Way.) (R-2 p. 310, line 7 to p. 314, line 18.)

During the period of the existence of the partnership some of the partners died. For example, Chin Wing died in 1932. When this occurred there was no formal dissolution of the business. Apparently by tacit understanding the son of the deceased partner inherited and succeeded to the interest of the father in the business. (R-2 p. 323, line 1.)

Certain new partners were added in 1927. These new men bought out the interests of original partners.

Chin Him succeeded to a part of the interest of his deceased father, Chin Wing, and a part was sold to others. The new partners' names were: Lowe Sun Ho, Chan Yon (incorrectly stated in the transcript as Chan Pon), Chan Lai, Chan Yuk and Chan Quong. There were then 24 partners. (R-2 p. 324, line 2 to p. 326, line 19.) Kong Chi Chan had withdrawn from the partnership and his share had been withdrawn from the capitalization, leaving a total capitalization of $22,500.00. (Deft. Ex. translation; Minutes of Oct. 20, 1940 meeting.)

There were other changes in 1933 but the total number and amount of capitalization remained the same. (R-2 p. 327, line 11 to p. 328, line 3.)

The principal place of business during all of the years has been at the same location. Jack Chan was the original manager and has remained the manager during all of the years, excepting for a short period of time when he was in China.

Some of the partners were working partners employed in the meat market and some were not; this was true all throughout the transaction of business until 1946. (R-2 p. 318, lines 7-21.)

The partners resided in various places; some in Sacramento, some in China, some in Portland, some in Los Angeles, and some in San Francisco. (R-2 p. 318, line 23 to p. 319, line 10.)

Originally the partnership operated only the one business at 816 J Street. Later it expanded, opening stores at 19th and Broadway, Sacramento, where one of the partners, Henry Chan, was manager (until 1939 when he left the employ of the partnership), at 31st and Alhambra Boulevard in Sacramento, operated by George Chan, another partner, a part of the time, and at 1920 Del Paso Boulevard, North Sacramento, managed by George Quock, son of one of the partners. None of these branch markets is still in existence, nor were any of them in existence during the period involved in this action. During 1943-1946 the Palace Market at 816 J Street was the only store. (R-2 p. 319, line 14 to p. 322, line 11.)

CHAN'S TRIP TO CHINA; MANAGEMENT OF STORE; FINANCIAL CONDITION; MEETINGS OF MEMBERS OF PARTNERSHIP JULY 28, 1940 AND OCTOBER 20, 1940.

Appellant Jack Chan went to China in 1940 to bring home a new wife. (R. 2, p. 328, lines 15-19.) While he was away George Chan, one of the partners, took charge of the business. Lila Chan, now Lila Lowe, one of Chan's daughters was to sign checks with George Chan. (R. 2, p. 329, line 3.)

While Jack Chan was away, there was a meeting of the membership of the partnership. It was held on July 28, 1940 at the Palace Market. After the return of appellant from China another meeting was called and held October 20, 1940.

Since the case of the prosecution is predicated upon a claimed termination of the partnership (said to have been held in 1941—but no meetings other than the two above were ever held) we shall digest rather fully the business of these two meetings.

Both meetings were held at the Palace Market, 816 J Street. The meeting of July 28, 1940 was attended by the following partners: Chan Him (son of Chin Wing who had died); Lowe Jin, Young Poy Kee (Harry Young), Chan Tin Kuei (George Chan), Chan Tin Foo (Henry Chan) and Kwok Bing Wah, who was the son of Foo Chong who was in China. The minutes show that of the total of $22,500.00 in shares, $15,900.00 were represented. The report of the bookkeeper showed that the partnership was indebted for back bills, back rentals and back wages. George Chan reported that in Jack Chan's absence he had been

delegated to investigate the accounts, had found the partnership in great debt and he had therefore called this meeting. The following resolutions among others were adopted:

(a) George Chan was to manage the main store, Chan Yee King was to manage the North Sacramento store.

(b) When Jack Chan returned another meeting was to be called and the accounts were to be reviewed and

(c) He would then be reappointed manager in order that the partnership could be aided by his experience apparently in composing the partnership debts.

(Defendant's Exhibit H, Translation.)

When appellant returned from China the meeting promised above was actually held on October 20, 1940. The partners present were: Chan Him, Lai Ching Low, George Chan, Henry Chan, Jack Chan, Harry Young, Kwok Bing Wah (representing Foo Chong) and several others.

Of the total of $22,500.00 shares, $19,300.00 was represented.

George Chan reported that the indebtedness of the partnership was then $20,500.00 and that the creditors' demands were urgent.

By resolution Jack Chan was made general manager of the store and was delegated to attempt to pacify the creditors of the business. Resolutions were

also passed requiring countersignatures of checks at the bank, calling for annual partnership meetings (which were never called or held) and for annual financial statements (which were never issued). (Defendant's Exhibit H, translation; R-2 p. 357, line 12 to p. 363, line 25.)

These two meetings are the only meetings of the partnership which have ever been held. (R-2 p. 357, line 3.) After the meeting appellant continued to manage the store. For a time two partners actually signed checks; later Jack Chan resumed the practice of signing checks alone.

As to all of the foregoing facts about the partnership, its origin, management, personnel and existence, there is not the slightest conflict in the record whatever. There is no evidence whatever of any meeting of the partnership in 1941 and no evidence of any collective action of the partners dissolving the partnership.

The minute book of the partnership is in evidence. (Defendant's Exhibit "H".) It is written in Chinese. There is ample blank space for the recordation of any minutes other than those recorded had such meetings in fact been held. The evidence of all of the witnesses is that no meetings were ever held.

**THE FACTS RELATING TO THE AFFAIRS OF THE PARTNERSHIP AFTER CHAN'S RETURN AND AFTER THE TWO MEETINGS (OTHER THAN THE CLAIMED EXTRA-JUDICIAL ADMISSIONS).**

The history of the partnership after his return from China and the holding of the meeting of October 20, 1940 was related by appellant, who was called as the first witness for defendant, and his testimony was supported by other witnesses and documentary evidence. There is no contradiction of the testimony which follows:

Between 1939 and 1943 appellant continued to run the business as before but some of the working partners quit the employ of the partnership. (R-2 p. 366, lines 9-19.) When they quit working for the partnership, *nothing whatever was said about their drawing down their interest in the partnership.* (R-2 p. 366, lines 20-24.)

The first partner to make any overtures about drawing down his interest in the partnership was George Chan. In 1945 George Chan asked appellant to buy him out and had his lawyer, Nelson French, draw an agreement which is in writing and is in evidence in this case. (R-2 p. 367, lines 1-20; Defendant's Exhibit "Z".) The cancelled check with which this interest was paid is in evidence. (Defendant's Exhibit "I"; R-2 p. 367, line 18 to p. 368, line 9.)

George Quok left the employ of the partnership in 1941. He was the son of Foo Chong, a partner. At the time that George Quok left the employ of the partnership nothing was said about his drawing out

his father's interest in the partnership. (R-2 p. 368, lines 12-22.) The father, Foo Chong, was then in China. He died there in 1942 or 1943. (R-3 p. 826, line 21 to p. 827, line 7.) Nothing was done about buying out the "Quok" interest in the partnership until 1946. At that time it was agreed that the interest would be repaid in two payments, of $1,300 each and these payments were made by two checks payable to Quok Brothers, one dated April 8, 1946, the other May 8, 1946. (Two other partners, Ling Chong with an interest of $500.00 and Chung Pon with an interest of $100.00 were bought out in the same transaction; they were indebted to Quok Brothers and the amount was paid to them and included in the payment of $2,600.00.) (R-2 p. 368, line 25 to p. 371, line 25.)

Purchase of the Foo Chong interest as thus testified to by appellant was confirmed by a written agreement dated April 4, 1946, in Chinese, translation of which is attached (Defendant's Exhibit "Q"), "I am yielding the entirety of this share ($2,600.00) to be bought by Chan Jock Wei (Jack Chan). After April 8, 1946, any profits or losses of the business will be shared or borne by Chan Jock Wei and have no connection with the former shareholder." It was provided that payment was to be made in two installments of $1,300.00 each.

The next partner to be bought out was Harry Young (Young Poi Gay, Young Poi Kay). He left the employ of the partnership in 1942 and opened up his own business. At this time back wages were owed to him which were paid back in 1944. Nothing was

said about buying out his partnership interest. (R-2 p. 372, line 19 to p. 373, line 23.) In 1947 Harry Young wrote Chan a letter. (Deft's Exhibit "K".) The letter is dated January 11, 1947.

In this letter Harry Young states:

> "Time passes swiftly. In a twinkling of an eye, a new year had arrived. Only but the new year brings happiness to you and your business is prosperous I shall be consoled. I have a request to make. Long time ago you and I formed the Palace Market at 816 J Street, Sacramento, California. It has been over twenty years to this date. *I have a share of $500.00 American money. I am planning to go into another line of business and am willing to have my share in the business withdrawn. Please have my share of $500.00 returned to me as soon as possible to clear all procedures.** After my withdrawal, any profits or losses, duties or liabilities of the company would have no more connection with me. This is a notification to avoid any future dealings.
>
> This is my request to you. I wish you the happiness of the new year."
>
> (Deft's Exhibit "K" translation.)

When appellant received this letter he sent Harry Young a check for $500.00. This cancelled check is in evidence. It is dated February 14, 1947. (Deft's Exhibit "L".)

Another partner bought out was Henry Chan. He quit the employ of the partnership in 1939, at which

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*Throughout this brief all emphasis ours.

time according to Jack Chan there was nothing said about his withdrawing his interest in the partnership. Appellant testified that the first discussion with Henry Chan about withdrawing from the partnership was in 1946 when Henry Chan stated that he wanted to withdraw his interest. Henry Chan has not yet been paid. (R-2 p. 378, line 2 to p. 380, line 1.)

As a part of his effort to bring all of the facts before the Court and jury, since the government who had subpoenaed Henry Chan had not called him or any of the partners, he was called as a witness for the defense. He was a most reluctant witness with a failing memory. However, we did succeed in dragging out of him that his "first conversation" with appellant about withdrawing his interest from the partnership was "when I first heard that he (Jack Chan) was making some money—*sometime after the war started*". During this conversation, which was very casual, he asked for his interest in the partnership. He doesn't remember Chan's reply but Chan didn't tell him he would pay him. (R-3 p. 790, line 5 to p. 794, line 17.)

Those being all of the facts which could be elicited from the witness on a direct examination, the prosecution (following the pattern set by the special agents in their investigation) sought to coax legal conclusions from the witness that he definitely understood when he withdrew from employment that he was withdrawing from the partnership. (R-3 p. 800, line 22 to p. 801, line 6.)

Of course it was an impossibility for this partner to have had that understanding at that time. The witness, who had left the employ of the partnership in 1939 had been present at both of the partnership meetings in July and October, 1940. He first denied this *but later admitted his signature and presence at the meeting.* He could not remember anything that happened at this meeting but the minutes show his presence. (R-3 p. 802, line 19 to p. 803, line 3.)

In the minutes Henry Chan is called by his Chinese name, Chan Tin Foo. (R-3 p. 803, line 3.) He voted for all the resolutions at the July meeting, retaining George Chan as manager providing for a better control of the bank account, reappointing Chan as manager, considering wages, etc. At the October meeting after Chan's return, he also voted in favor of all the resolutions, appointing Jack Chan manager, approving his delegation to deal with creditors, providing for counter signatures on checks, etc. (Deft's Exhibit "H" transaction.)

Obviously, if he had considered himself out of the partnership in 1939 when he left its employ, we would not have found him actively participating in the partnership meetings of July and October 1940 as a partner.

The next partner, the termination of whose interest was discussed was Chin Wing. Chin Wing was Jack Chan's uncle. He died in 1928. Following the custom of this Chinese partnership, however, his widow and son "inherited" his interest. The son was Chin Him.

And it is Chin Him who is listed in all of the partnership returns as the partner (i.e. until the interest had been bought out). (See Plaintiff's Exhibits 5, 6, 7, and 8.) In 1946 Mrs. Chin Wing came to see appellant, and he agreed to buy her out. The consideration was $2,000.00. However, again the following other partners: Chin Lai, Fong Wong, Chin Yok and Fung Chung, were indebted to the Wing family, and Mrs. Chin Wing claimed the right to their share. A check was issued for $4,800.00 covering all these interests. It is defendant's Exhibit "M" dated June 5, 1946. (R-2 p. 380, line 4 to p. 384.)

The rest of the partners who were paid off by appellant were paid off by the cancellation of indebtedness owing by them to Chan. (R-2 p. 385, line 13 to p. 386, line 5.)

After the testimony of Jack Chan, the defendant also produced as witnesses, the other partners who were available. These men had all been subpoenaed by the prosecution. Reliance by the prosecution on the extra judicial statements of the appellant was not a matter of necessity. The government could have called these witnesses. Since it failed to do so, and in an effort to get all of the facts into the open, the defendant produced the following partners and their testimony.

He produced as a witness Lai Ching Low, a San Francisco merchant, a member of the San Francisco firm of Hip Hing Company (R-2 p. 445, line 14) and a member of the Palace Market partnership. (R-2 p.

435, line 7.) He was one of the original partners, his capital share being $500.00. He was not a working partner. He attended the meeting of the partnership held in October, 1940. He confirmed the facts above stated as to the business transacted at this meeting. He affirmed that at this meeting there had been no mention of dissolution of the partnership, nor had this subject ever been discussed with him and that the first mention of his leaving the partnership had been in 1947 when he told Chan that he wanted to terminate his interest as a partner and when his interest was bought out by Chan. (R-2 p. 435, line 4 to p. 440, line 8.) On cross-examination, the witness stated that he had never been advised of the capital net gain of the business and that he intended to demand an accounting from appellant. (R-2 p. 440, line 13 to p. 444, line 20.)

Appellant also produced as a witness George Chan, one of the partners.

He had first entered the employ of the partnership in 1924, and from one to five years thereafter had become one of the partners. When the appellant Jack Chan went to China in 1940, he was the acting manager of the partnership. He was present at the meeting of October 20, 1940, when Chan returned.

He reaffirmed that at this meeting appellant was reappointed the manager of the partnership. No mention was made at this meeting of any dissolution of the copartnership. After the meeting George Chan remained in the employ of the partnership for from five

to six months. He quit such employment to go into business for himself. At the time of his leaving the employ of the partnership nothing was said about his terminating his interest as a partner.

(R-3 p. 803, line 23 to p. 808.)

He then testified that he had gone to a Sacramento attorney Mr. Nelson French in March of 1945 and had had him handle the negotiations for and draw the agreement terminating his interest in the partnership, Mr. Jack Chan buying him out and paying $500.00 for his interest. (R-3 p. 808, line 11 to p. 812, line 3.)

This agreement is in writing and is in evidence as the Defendant's exhibit "Z". It states in part:

> "For and in consideration of the sum of $500.00 to me in hand paid, the receipt of which is hereby acknowledged, I hereby sell, assign, transfer and set over unto Jack Chan all of my right, title and interest in and to that certain partnership which conducts in various branches a butcher business. (There follows a description of the business which were then or had formerly been operated)" * * *
>
> "* * * I hereby acknowledge receipt from Jack Chan of full settlement of all sums or other things due to me from him from the beginning of the world to the date of these presents." (Defts. Exh. "Z".)

On cross-examination it was sought to have the witness testify that he had actually terminated his interest in the partnership earlier. The following was the net result of this attempt:

"Q. Well, didn't you think that you didn't have any interest in those businesses?

A. I never gave it a thought.

Q. Never gave it a thought. You never got any profits from any of them?

A. Never did.

Q. And you never got any profit from the Palace Market either, did you?

A. Never did.

Q. And you know, as a matter of fact, that your interest in the Palace Market, whatever interest you had, terminated in 1941, isn't that right?

A. Never terminated. * * *

Q. I will ask you if Mr. Chan didn't agree to pay you back $500 which you had put in the business?

A. We never talked about that.

Q. You never talked about that. And wasn't it agreed between you and Chan that in 1941 that you dropped out of the partnership, and you terminated—'I call it terminated' in 1941 isn't that true? Isn't that what happened?

A. I quit work there that's all.

Q. But didn't you terminate all your interest in the partnership as of 1941?

A. No——"

(R-3 p. 816, line 1 to p. 817, line 2.)

The prosecution then sought to impeach Mr. Chan by showing that he had made a statement in writing to special agent C. L. Englund. This statement was typical of the statements taken by this special agent in that he sought to elicit, and did elicit, not facts, but

conclusions of law. The questions and answers were as follows:

"* * * as far as you are concerned, you dropped out of the partnership in 1941, is that correct?

A. I call it terminated then."

(R-3 p. 820, lines 13-25.)

"How long were you a partner at the Palace Market?

A. From '27 to '41."

These of course are conclusions of law. No effort was made by the agents to obtain *the facts*.

However, it is very possible that when the witness had quit the employ of the partnership he had considered that his interest in the partnership terminated by the very fact of termination of employment.

Such, of course, is not the legal consequence of termination of employment.

Had the agents been sufficiently interested they would have sought to elicit facts—rather than conclusions—they would have asked for conversations between the partners, and for written evidence and they would have learned that when George Chan had quit his employment he never so much as said a word about his partnership interest terminating, never gave it a thought (R-3 p. 816, line 2) and that when he went to his lawyer he was advised that he did have an interest in the partnership. "That is what the lawyer said" (R-3 p. 814, line 2), and it was then in March 1945 that he had an agreement in writing drawn under which appellant bought him out.

The next witness was Henry T. Chan, upon whose testimony we have already commented.

Also as we have demonstrated above the defendant in an effort to get all of the facts before the jury, produced and translated the minutes of the two meetings. (Supra p. 7.)

The following other evidence was introduced to corroborate the testimony that the partnership was still in existence during the period from 1943-1946.

A letter from another partner Chan Sheu Chun dated November 3, 1947 asks for money and says "I am willing to have my share book put in your hands and withdraw the share from the store."

An examination of the partnership returns will show that as each partner's interest was bought out, as shown by the above testimony, that partner's name was dropped from the list of partners named in each return.

Thus appellant's testimony was confirmed by the other partners themselves, corroborated by written agreements, by cancelled checks, by all of the evidence save and excepting only the conclusions of law contained in statements taken by the agents.

The prosecution called as its witness on rebuttal* Harry K. Young. He testified that he had been a partner commencing in the 1920s. He had also been employed by the partnership. He had been present

*Although subpoenaed by the prosecution and present at the outset of the trial he had not been called.

at the meeting on October 20, 1940. At this meeting nothing was said about getting rid of the partnership. (He thought that the meeting he had been present at had been in 1941.) At the meeting it was decided "to put Mr. Chan on his present job." Nothing was said in 1941 about buying out his interest in the partnership. After 1941 he didn't have anything more to do with the market. In 1947, he had a friend write for him the letter which is Defendant's Exhibit "K". (R-3 pp. 830-841.)

Again the prosecution sought to impeach the witness by showing that he previously had stated, or the special agents had said that he had stated conclusions that he was out of the partnership after 1941.

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**GOVERNMENT'S EVIDENCE AS TO THE DISSOLUTION OF THE PARTNERSHIP.**

The prosecution's whole case was built up on the proposition that a meeting of the partnership was called and held sometime in 1941 at which the partnership was dissolved—not that one or two partners dropped out of the partnership, but that it was wholly and completely dissolved and that Jack Chan during the years 1943, 1944, 1945 and 1946 was the sole owner thereof.

The prosecution relied entirely upon the testimony of two special agents of the Internal Revenue Department, C. L. Englund and Mrs. J. F. Devine, who testified to the following "admissions" of appellant:

"Q. Did he tell you what the nature of the business association had been?

A. He did.

Q. What did he say?

A. He said it was a former Chinese partnership.

Q. And these were former partners?

A. That is correct.

Q. What information did he give——

The Court. Q. First, did he give you information as to when they were partners?

A. He did, yes sir.

Q. When did he say they had been partners?

A. They had been partners since the early thirties, early 1930s.

Q. Did he tell you when the partnership was dissolved?

A. Yes sir.

Q. When did he say it was discontinued?

A. He stated it was discontinued in 1941.

Mr. Johnston. In that connection, Mr. Englund, you obtained a statement under oath from Mr. Chan, did you not?

A. I did.

Mr. Johnston. And if the court please we intend to introduce that a little later in Mr. Englund's testimony."

(R-2 p. 99, line 10 to p. 100, line 7.)

* * * * * * *

"Q. Mr. Englund, under what circumstances did you converse with the defendant as to this prior partnership? Was the conversation entirely under oath, or did you have some conversations which were not under oath and some that were?

A. We had one statement that was under oath and several statements that were not under oath.

Q. Did you discuss this matter with him on the occasions to which you have previously testified he was not under oath, is that correct?

A. That is correct.

* * * * * * *

Q. Can you identify the dates on which you had discussions about the partnership?

A. I think so. You mean in regards to the partnership.

The Court. In regards to the partnership.

A. Yes sir, on July 23, 1947, we had a conference with Mr. Jack Chan in Room 270 in the Federal Building, Sacramento. * * *

Q. Who was present, Mr. Englund?

A. There was former revenue agent Edward Riordan, Jack Chan and myself. * * *

Q. Now on what other dates did you have conversation with respect to the existence of a partnership?

A. On December 19, 1948 at which time we took a sworn statement from Jack Chan under oath?*

Q. Where was that?

A. In Room 276 Federal Building, Sacramento.

Q. Who was present?

A. Mrs. J. Devine, Mrs. Rhodes, Mr. Chan and myself.

Q. Did you have any other discussions——

A. Yes sir.

Q. When was that?

A. On August 4, 1947.

Q. And where?

A. That was at 816 J St.

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*The witness has confused the date, it was January 19, 1948. (See R-2 p. 134, line 2.)

Q. And who was present?

A. Jack Chan and myself.

Q. Was there any other conversation——

A. We had several conversations throughout this period with Mr. Chan and occasionally the partnership was brought up.

Q. Do you recall the exact dates of those conferences now, Mr. Englund?

A. No sir, I don't."

(R-2 p. 100, line 18 to p. 104, line 2.)

* * * * * * *

"Mr. Johnston. Q. Now, Mr. Englund, you testified that at one time you questioned Mr. Chan under oath and that the record was made of his testimony on that occasion, is that correct?

A. That is correct.

Q. Do you have an original copy of the transcript that was made at that time?

A. I do.

Q. Will you tell us the date that the statement was taken?

A. January 19, 1948."

(R-2 p. 133, line 18 to p. 134, line 2.)

This sworn statement will be considered hereinafter. First, we will dispose of all the so-called oral statements which the agents say that Chan made.

The following further testimony was given by the witness C. L. Englund:

"Mr. Johnston. * * * Did you ever discuss that matter with Mr. Chan on any other occasion than when the formal statement was taken?

A. Yes sir.

Q. Do you recall when that statement took place?

A. It was sometime in January. I believe it was the 5th of January.

Q. What year?

A. 1948.

Q. Do you remember who was present?

A. That one particular conference was a preliminary conference and I don't believe anyone was present there.

Q. Except you and Mr. Chan?

A. That is correct.

Q. What was said on that particular occasion as to the existence or dissolution of the partnership——

A. On January 5, 1948 when discussing the building Mr. Chan had purchased in 1948 we asked him if that was his building. We said we noticed the building was purchased from funds on the Palace Meat Market account in the Capital National Bank. We asked him if that was correct and he said yes, that was correct, that he drew the funds on that account. We asked him if that was a partnership account. He said no, it wasn't a partnership account, it was his account. We asked him then if anyone had an equity in the Palace Market. He said no, 'business all mine since 1941.'

We also asked him if any of the assets appearing on the balance sheet we had compiled were partnership assets. He said no they were all his assets.''

(R-2 p. 144, line 14 to p. 146, line 1.)

One of the partners was a man named Chin Wing. He was one of the original partners and he was Jack Chan's uncle. His son is Chin Him and Chin Him took his place in the partnership when the father Ching Wing died in 1928 (R-2 p. 324, line 14 to p. 325, line 5; R-2 p. 380, line 5.) All of this information was available to the treasury department agents. Nevertheless Mr. Englund testified as follows:

> "Q. What did Mr. Chan tell you about Chin Wing's relationship to the business?
>
> A. Chan stated that that check (a check drawn June 5, *1946* cashed by Mrs. Chin Wing) represented a payment that he had made to Chin Wing, Chin Wing had been a former partner of his—was a partner with him in about 1923 and Mr. Chin Wing dropped out of the partnership in about 1932, that he had paid his liability to Chin Wing in 1946 with that check."
>
> (R-2 p. 146, line 24 to p. 147, line 5.)

Chin Wing had indeed "dropped out" of the partnership in 1932. He had died. But Mr. Englund either failed to ascertain, or preferred not to reveal, that as was customary in this Chinese partnership the son, Chin Him took his place—was listed as a partner in all of the partnership returns during this period. (See Partnership Returns for 1943, 1944, 1945 and 1946, Plaintiff's Exhibits 5, 6, 7 and 8.) And when Mrs. Chin Wing was paid off she was paid off not only for herself but for several other partners in 1946. (R-2 p. 380, line 5 to p. 383, line 10.)

Excepting for the "sworn statement" these were the only statements which any agent of the government produced as to what Mr. Chan is supposed to have said.

Mr. Edward Riordan, the government agent who had been present during one of the alleged conversations, was not produced by the government as a witness.

Mrs. J. F. Devine, the second of the special agents of the Internal Revenue Department who participated in the investigation, and a witness for the prosecution, testified (regarding a conference with appellants December 3, 1947):

> "Q. Now, at the time of that meeting did Mr. Chan make any statement to you or in your presence as to the history of the ownership of the Palace Market?
>
> A. Yes, he did.
>
> Q. What did he say at that time?
>
> A. He said that the market, three partners, were in it originally in 1923.
>
> The Court. How many?
>
> A. Three. In 1927 it was reorganized and there were twenty-five partners. In 1932 there was again a change of partners—some dropped out and new ones came in, and there were various changes of partners, until they dropped out in 1941.
>
> Q. * * * Was there anything said by Mr. Chan on that occasion with respect to the management of the partnership business?
>
> A. Yes, sir. He said that he was the manager, he was the boss man, no one had anything to say

about it; that he alone could sign checks, except for the two months that he was in China.

Q. Now was anything else said by Mr. Chan on that occasion with respect to the history of this business organization, or its management?

A. Yes, that only the original investments were repaid. At no time were the profits divided, and that these partners—so-called partners—he didn't say that, his conversation was the partners that worked in the store received salary. Those who did not or were silent partners, they didn't receive anything except their original investment *when they withdrew from the partnership.**

* * * * * * *

A. * * * we talked about Chin Wing, who came into the partnership in 1923. He invested $5,000.00 and 1932 he left the partnership. Sometime thereafter $200.00 was repaid, and then in 1946 * * * Mr. Chan repaid *Mr. Wing's widow $4800* for the amount he invested in 1923, although Mr. Wing was not a partner in 1932. So that he still called him partners, even after they dropped out, and they had no interest in the business.

Q. Did Mr. Chan say anything else about the operations of the partnership?

A. He just insisted very emphatically that there was never any division of profits; that the partners didn't receive anything and he paid them back, he just paid the original investment."

(R-2 p. 227, line 2 to p. 228, line 24.)

The witness then testified about presentation of net worth figures and her presence when the so-called "sworn statement" was taken.

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*This is quite true. And ALL the evidence showed that this was paid in 1945, 1946 and 1947.

THE SWORN STATEMENT.

On January 19, 1948, after twenty-some conferences the Special Agents placed Mr. Chan under oath (without benefit of counsel of course) and he was subjected to examination for several hours. The record of this statement is a transcription prepared by Mrs. Rhodes. Excepting that we believe she used 1932 instead of 1942, obviously intended in one place, we believe the transcription is substantially correct. It was introduced as Plaintiff's Exhibit 40. The Court will undoubtedly wish to read it in full. Pertinent excerpts are as follows:

"Q. Was their (i.e. the partner's) original investment paid back to them when they terminated, *when they left the partnership?**

A. I pay them.

Q. Did you pay them back by check or cash?

A. Mostly by check, some by cash——

Q. If they (the silent partners) left the partnership, did they receive their original investment back?

A. Yes——

Devine. There were twenty-five partners in 1945 and there were ten in 1946?

A. Yes, mam.

Devine. Here I have the name of fifteen partners that were partners in 1945, but were not shown as partners in 1946. I'll go down the list and will you tell me how much you paid each one when he left the business in 1945? The first one is Chin Ling. How much did you pay him when he left the business?

*Since the partners were paid in 1945, 1946, 1947 this is tantamount to a statement these partners left the partnership then.

A. I can't remember. I think probably about $2,000.00. I can't remember——

Q. Were all these partners in 1945 (pointing to partnership return for the year 1945)—— Were they members of the partnership in 1945?

A. Yes.

Q. Let's see, you have Chin Ling listed. Was he a member of the partnership in 1945?

A. Yes.

Q. Was he a partner in 1946?

A. 1946 no. 1940 I went back to China and then '41 all partners everybody dropped out of business. Nobody wanted to stay in business. Too many bills, and then I take them all. I told partners I will pay everybody. I was working hard. I told creditor we pay month by month and year by year and pay everybody. Partners don't want in. I give money back. I pay everyone back for the partner capital. Somebody dropped so I pay back cash. I been here about thirty years and I don't want to owe anyone. I pay them back because I don't owe one penny. My wife, my whole family work. Everyone, in other words, *now the business mostly mine.* Stay or let them go."

(There follows a statement regarding the repayment back of the capital investment. Then the following was said):

"Q. How many shares did Low Chiang have?

A. He had five shares.

Q. *Is he still a member of the partnership?*

A. *No.*

Q. *Do you remember when he left?*

A. *'46.* * * *"

(Pltfs. Exhibit 40.)

Several days after he made this statement Mr. Chan was asked to correct it. He doesn't read English very well, but he does read. On page 8, in exactly the same place where on page 9 he had said: " '41 all partners everybody dropped out of business" he wrote in ink, *"1946 10 partners J.C."*

The Court in reading the transcript of this statement will note the singular failure of the special agents to ask for any FACTS as distinguished from conclusions showing that there had been a dissolution of the partnership. On cross-examination of Mr. Englund, we tried to elicit some information about such facts:

> "Q. * * * you knew, did you not, that in approximately 1941 the working partners ceased to work for the partnership; isn't that correct? You knew that, didn't you?
>
> A. I believe Jack Chan stated that, yes.
>
> Q. And isn't it what he told you, Mr. Englund, that the working partners had in 1941 ceased to work for the partnership? Isn't that what he told you on January 5, 1948?
>
> A. That among other things. He elaborated on that fact.
>
> Q. Isn't that——
>
> The Court. Q. Go ahead and give the elaboration.
>
> A. He stated that not all the partners worked for the partnership in 1941, that some of them were living in China, some were dead during the period and were still being carried on the books and records as partners. He said there were equities in the partnership as represented by their families.

Q. And he told you that the working partners had quit working in 1941, didn't he?

The Court. Q. I understood you to say in the conversation of January 5, 1948, he said that all the assets of the market belonged to him?

A. That is correct, yes, sir.

Q. And I understood you to say also that they all belonged to him since a certain date?

A. No, he said in 1941 all the partners dropped out of the business.

Q. I think you went further than that on direct and said that all of the assets and deposits of the Palace Market were his since 1941.

A. That is with respect to the assets we have here, because those are the only accretions that took place during the period, what he acquired himself on this balance sheet.

Q. Of course, we want to know from you, as definitely as you can recall, what he said about the ownership of the assets of the Palace Market and when that ownership started.

A. I believe he said that the Palace Market as such started in 1923 and was reorganized again and started in 1927, and in 1941 the business was heavily in debt and that they had a meeting and they decided that everybody drop out of the business, and he say, 'I take it all.' He is probably referring to these assets——

Mr. Pierce. Now, just a minute——

The Court. We just want the conversation. He said, 'I take it all'?

A. That is right.''

(R-2 p. 205, line 1 to p. 206, line 18.)

The assets to which Mr. Englund is referring are the assets acquired AFTER 1943, the assets which appellant admittedly took in his own name and with funds taken from the partnership.

The foregoing is all of the evidence which the prosecution offered to prove its contention, which in his opening statement the U. S. Attorney, Mr. Seawell, had stated the government would prove: that a meeting of the partnership had been held in 1941 at which the partnership had been dissolved.

Objection was made to the introduction of all of this testimony. Before any conversations with the defendant were related we made this objection:

> "Mr. Pierce. Just a moment, please, may it please the court, I wish to object at this time to the introduction of any conversation between this defendant and the witness. I object upon the ground that the only purpose for which a conversation of a defendant in an action such as this may be introduced is for the purpose of showing an admission, and that admission may not be shown in an action of this kind until the corpus delicti has been established.
>
> In support of my objection would like to refer the Court to the case of the People v. DeMartini, 50 California Appellate 109, which contains a very full explanation of the well-settled common law rule in that respect, and that the common law rule is the rule applicable to Federal courts I believe is also well accepted under circumstances of this kind.
>
> The Court. Overruled."
>
> (R-2 p. 48, line 19 to p. 49, line 8.)

When similar questions were later asked:

"Mr. Pierce. Objected to on the same ground as heretofore stated. May it be stipulated, your Honor, so I won't be constantly interrupting——

The Court. That is right. Overruled.

Mr. Pierce. The same objection may go to all of the questions concerning the conversation between the defendant and this witness?

The Court. Yes. Proceed."

(R-2 p. 55, lines 9-16.)

Upon the conclusion of the case of the prosecution, the defendant moved the Court for a judgment of acquittal upon the ground (among others) that the respondent had not sustained its burden of proof, that the sole evidence of the dissolution of the partnership was the claimed extra judicial statements of the appellant, that this fact was the fact upon which the guilt or innocence of the appellant hinged, and the only fact upon which a case could be made at all, and that the *corpus delicti* had theretofore not been established.

This motion was also denied.

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### APPELLANT'S BOOKS AND RECORDS AND METHOD OF BOOKKEEPING.

During the years 1943-1946 the Palace Market was engaged exclusively in the meat business. There were some charge accounts but most of the sales were cash.

When a purchase was made at the store, the money was rung up in the cash register. (R-2 p. 412.)

There was no tape on the cash register but readings could be taken of the totals. When purchases were made there was a spindle on which the invoices were impaled. Large purchases were made by check, small purchases were sometimes made in cash, which was taken out of the cash register. (R-2 pp. 413-415.)

When a charge sale was made, three copies of the sales tag were made, one of which went to the customer and two of which were kept by the market. The latter two were put on the spindle and at the end of the day, in a customer's file.

When the customer paid his bill the money was put in the cash register, but not rung up. The customer's bill was receipted and the entry was made at night in the daily record hereinafter noted. (R-3 pp. 679-681; R-2. pp. 415-417.)

All money that was received at the end of the day was counted twice when taken from the cash register, went into the safe and the next day it all went into the bank. (R-2 p. 417; R-3 p. 588.)

There were three bank accounts, two in the Merchants National and one in the Capital National Bank, all of which were checking accounts and all of which were apparently used interchangeably. (R-2 pp. 25, 26.)

The basic books kept by appellant were the daily reports which are in evidence as Defendant's Exhibit "A". These daily reports are for every day of the year that the market was open during all of the years 1943 through 1946. They are in two parts, one in

English and the other in Chinese. They reflect accurately all receipts and disbursements. (R-3 p. 587.) They were kept by appellant, and by his daughter Mary; in 1942 Lincoln Chan had assisted. (R-2 p. 388, lines 17-20.)

At the trial these were explained by appellant and by his daughter Lila. For illustration, at the trial we selected at random one day, January 3, 1944.

Explaining the English portion of the record, in one column were the cash receipts with "currency", "silver" and "checks" stated separately and totaled. (R-3 pp. 703-705.) If there was only a small amount in silver this was left for change and not added (R-3 p. 704), but if the amount in silver was considerable it was added and banked with the currency. (R-3 p. 712, line 11.)

The next column is the "Cash Paid Out" column which has a heading "Pd". The English record shows only the small "cash" payments, not the checks. (R-3 p. 713, line 13.) The next column, on the left-hand side, shows the sales made. These contain two figures, one for each cash register reading, and the total. (R-3 p. 708, lines 16-18 and p. 714, line 19.)

In addition to the cash register readings, the receipts from charge sales are shown and added. (On January 3, 1944, $111.11 was received.) (R-3 p. 714, line 19.)

The Chinese daily reports are more complete. These show the total sales for the day as shown on the English records, but they also show other receipts; e.g.,

on January 3, 1944, they show rent paid by an employee of $6.00. (R-3 p. 716, line 20 to p. 717, line 8.) These receipts are shown at the top of the report.

On the bottom are shown the paid-outs, including the cash paid out, miscellaneous and merchandise in separate columns, and these items are a break down of the totals shown on the English report. (R-3 p. 718, line 10 to p. 719, line 15.) In addition, the amounts checked out are shown under captions showing to whom the checks are issued, e.g., "Morrell", "Swift", "Rent" etc. (R-3 p. 719, line 23 to p. 720, line 19.)

As stated above these records are complete for every day in the year, during all these years. (R-3 p. 721, line 16.)

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THE CHINESE JOURNAL AND LEDGER.

In 1942 and 1943 appellant had a hired bookkeeper, Lincoln Chan. (R-2 p. 336, line 11.) While he was employed (on a part-time basis) he kept a journal and a ledger in Chinese. These books are in evidence. (Defendant's Exhibit "A".) They cover only the years 1942 and 1943. And are complete for those years showing every transaction of every day. (R-2 p. 338, line 10.) The journal was kept from day to day and its entries were taken from the daily reports which have been hereinabove described. (R-2 p. 337, lines 11; 18.) The second volume was the ledger which is what the name implies. In it items are classified ac-

cording to their nature. Posting in the ledger was done at intervals. (R-2 p. 340, lines 1; 12.)

For the purpose of showing the completeness of the Chinese books in 1943, a translation had been made of a summary of all figures contained therein. This summary was admitted in evidence as Defendant's Exhibit "G" and shows all receipts and disbursements classified. The summary was checked against the original books kept by Lincoln Chan and it is correct. (R-2 p. 342, lines 13-18.)

The Chinese books were not kept after 1943. The daily reports contain exactly the same information.

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**ENGLISH DAILY SUMMARIES OF THE DAILY REPORTS.**

During the investigation by the special agents of the treasury department, James Soohoo, an accountant, was employed by appellant to make an audit of the books and to furnish this audit to the agents so that they could understand appellant's books.

At the outset of this investigation Mr. Soohoo informed appellant that it would be necessary to have a translation made, or a summarization in English of the Chinese daily reports. (R-3 p. 759, line 4.) This summarization was prepared by Lila Lowe, appellant's daughter, with the assistance of appellant, and her figures were checked by appellant. (R-3 p. 759.) The summarization includes a complete daily record of all receipts and disbursements excepting the disbursements paid by check as to which appellant had

all of the cancelled checks and furnished them and also the summarizations to the special agents. (R-3 p. 723, line 25; p. 158, line 13; p. 162, line 5.)

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**THE BUTCHER PAPER MONTHLY SUMMARIES.**

In 1943 appellant prepared his partnership returns directly from the Chinese books. In 1944, 1945 and 1946, he prepared them from summaries, referred to throughout the trial as the "butcher paper summaries" which were prepared from the "Daily Reports". (R-2 p. 463, line 23; p. 464, line 4; p. 466; p. 467, line 12; p. 489, line 23.)

During the investigation appellant furnished these butcher paper summaries to Special Agent Englund and they were found to agree with the partnership return. (R-2 p. 167, line 9; p. 189, line 21.)

These butcher paper summaries appear in evidence as Defendant's Exhibits "T", "U" and "V". They are in English. They are similar to the translations of the Chinese books introduced as Defendant's Exhibit "G" showing all items of receipts and expenditures by classification and for each of the months of each of the years.

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**DELIVERY OF ALL BOOKS AND RECORDS TO SPECIAL AGENT.**

On March 24, 1947 appellant delivered to Special Agent C. L. Englund (1) all of the daily records in English and in Chinese which are Defendant's Ex-

ıibit "B". (R-3 p. 650, lines 2-10.) These were re-ceipted for as follows:

> "Memo sheets containing a chronological tabulation of sales and expense items recorded in English which were entered on deposit slips of the Merchant's National Bank for the period 1943 to 1946, inclusive. * * * Memo sheets containing daily sales and expense items recorded in Chinese on deposit slips of the Merchant's National Bank, together with adding machine tapes for the period 1944 to 1946, inclusive." (R-3 p. 651, lines 1018; Plaintiff's Exhibit 42.)

Also he delivered the two bound books (Defendant's Exhibit "A") constituting the Chinese journal and ledger for the year 1943. (R-3 p. 651, line 19.) Also he delivered the three butcher paper summaries. (R-2 p. 651, line 21.) Also he gave access to Special Agent Englund of all his bank accounts, his cancelled checks, his bank statements and his check stubs. (R-2 p. 148, line 11 to p. 154, line 16.)

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**THE EVIDENCE OF THE PROSECUTION RELATING TO THE INADEQUACY OF APPELLANT'S BOOKS.**

As has been stated above, the whole case of the prosecution of income tax evasion was built up on the so-called "net worth, expenditures" method.

It was recognized by the special agents that they were only allowed to use this method "when the taxpayer's books and records are inadequate and we are unable to interpret them". (R-2 p. 168, line 1.)

In this case this hurdle was very simply overcome. The prosecution had special investigator C. L. Englund testify to the legal conclusion that the books were inadequate. The following is his testimony (over objection by defendant):

> "Well, I informed Mr. Chan that the books and records that he had given me on the first call on March 24, 1947 did not agree with his income tax returns. He stated then that he had some Chinese books and records, and I asked him if those are the records that he used in preparing those various income tax returns and he said yes.
>
> So I asked him if the government could have access to those records. He said they were in Chinese. And then I asked him if he would have any objection to submitting them anyway, and he said no, and he produced them.
>
> Mr. Johnson. Q. Did you make an examination of those additional records, Mr. Englund?
>
> A. Not personally, no. We had a Chinese translate the 1943 records.*
>
> Q. Did you find that upon the basis of all of the books and records which the defendant made available to you you were able to make a correct computation of his income for the years 1943 to 1946 inclusive?
>
> A. No, sir.
>
> Q. Why were you unable to do that?
>
> A. The books were not complete with all the information and there weren't all the information in the books and records.

*Compare this with the statement, infra, p. 52, that they couldn't be translated because the dialect was different.

Q. So you found that the books which had been submitted were incomplete, insufficient and inadequate for a correct computation of the defendant's income, is that correct?

A. I did."

(R-2 p. 49, line 12 to p. 50, line 12.)

(The witness then proceeded to testify that the income had been computed on the net worth-expenditure theory.)

Having heard Mr. Englund's conclusion that the books and records were inadequate, let us now see if his own testimony backs this up:

On cross-examination he testified that he was engaged in this investigation for approximately nine months, lasting from March 24, 1947 to February 12, 1948, that appellant cooperated with him fully in every respect, giving him everything he asked for in the approximately twenty contacts which the witness had with appellant. (R-2 p. 147, lines 8-25.)

Appellant gave the agent access to all of his bank accounts, his bank statements, his cancelled checks, his check stubs, his books, including the books now in evidence as Defendant's Exhibit "A" and which are the Chinese ledger and journal to be hereinafter more particularly described. (R-2 p. 148, line 11 to p. 154, line 16.)

"And did he offer full access to those books to you?

A. Translated them to a great extent."

(R-2 p. 154, lines 17, 18.)

We then asked Mr. Englund if he had access to Chinese translators and he stated that he did. (He mentioned Mr. Victor Chin, who was present in the courtroom, sitting with the treasury department agents all through the trial and who checked the translations made by defendant.) (R-2 p. 155.) Thereafter the following very significant testimony was given:

> "And Mr. Chin stated that he was unable to identify the Chinese writing in it, because he did not speak the same dialect, apparently, that Mr. Chan had written the books in, so he did not know how to read the headings, like what the——
>
> Q. Then——
>
> Mr. Seawell. Let him finish his answer.
>
> Mr. Pierce. Go ahead by all means. Had you finished?
>
> A. He said he was unable to identify the heading, but he could read the figures, so I would, transcribe the figures on adding machine tapes.
>
> Q. And did you transcribe all of the figures contained in those two books?
>
> A. Not all the figures, no sir."
>
> (R-2 p. 156, lines 1-14.)

We then asked him what figures he had transcribed and he said that he had transcribed the figures for 1944 and 1945. We informed him that the books only covered 1942 and 1943 and the witness said that Mr. Chan had told him they covered 1943 to 1946. (R-2 p. 156, line 22 to p. 157, line 17.) He later said that he just assumed that he was reading from books cov-

ering 1945, 1946 and 1947 and that Mr. Chan did not tell him they were books for those years. (R-2 p. 158, line 16.)

The witness again testified:

"Q. Do you say that Mr. Chin (the interpreter) did not read the dialect in which these books were written?

A. He stated that he could not read the dialect in which these books were written."

(R-2 p. 158, line 21.)

The witness then testified that he had gotten a translation of the sales for 1943 from Mr. Chan and that this translation had been accepted as correct. He had also gotten a translation of cash pay-outs for the years 1944, 1945 and 1946. He never had a complete translation of the books or records. (R-2 p. 159, line 7 to p. 162, line 17.)

The witness was then shown a typical batch of the records which were known throughout the trial as "daily reports" or "daily records". These are Defendant's Exhibit "B". They are on deposit tags of the Merchants National Bank. They are in English and in Chinese. They will be explained more fully hereafter.

The witness testified these records had been submitted to him during the investigation. He then testified:

"Q. Did he tell you how they were kept?

A. No, he tried to make an explanation, but they had no reference on them as to what the

figures represented, so for our purposes we had nothing to back them, so we didn't use those."

(R-2 p. 163, lines 4-8.)

Mr. Englund testified that the appellant informed him that these were his books, but Mr. Englund made no effort to check them to find out what was in them. He stated that they were not adequate and he assigned as his reason:

"Q. Did you make any effort to find out what the various items were on those records?

A. No, because on the face of them, there is no information that would indicate what they were for. They are just figures.

Q. Did you ask him what the various columns meant?

A. Chan tried to explain them, I believe he stated some of those were kept by his daughter and that she could probably interpret but I never asked her * * *

Q. Did you make any effort to have these translated?

A. No, sir."

(R-2 p. 165, line 20 to p. 166, line 12.)

(It is clear from the testimony quoted above that Mr. Englund had only to ask Mr. Chan or his daughter for the explanation of column heads and all of the reports would have been revealed as a complete record of receipts and disbursements.)

In addition to the bound Chinese records and the daily reports, Mr. Chan brought to Mr. Englund, the summaries which are now in evidence as Defendant's

Exhibits "T", "U" and "V". (These are on butcher paper and are complete summaries month by month for all of the years, stipulated to be correct, of all sales receipts and all expenditures classified in the various categories of accounting.) (R-2 p. 167, line 8.)

This summary agreed with the partnership returns filed by the appellant (R-2 p. 190, lines 1-6.)

On redirect examination, Mr. Englund added to his explanation of the inadequacy of appellant's books as follows:

> "Q. What was your reason for concluding, as you have testified that you did, that the Chinese books and records were not adequate for a computation of defendant's correct income for tax purposes?
>
> A. Because we were unable to read them.
>
> Q. And was that the only reason?
>
> A. No, we couldn't identify the amounts that were in the books. He had a set of records in English, that he submitted on those cards that were submitted in evidence, which when totaled did not agree with the income tax return."

We were able to bring out on cross-examination as to why the totals did not "add up".

We had asked Mr. Englund how he had totaled the daily reports in English. We asked:

> "Q. How did you distinguish which were purchases and which were sales?"

(We asked this in view of his previous testimony that he didn't know which column was which.)

"Mr. Chan tried to explain—it appeared that they were all treated the same way * * * We were unable to follow him.

Q. And isn't it a fact that the reason your total didn't add up was because sometimes you didn't know you were writing debits and sometimes you didn't know you were adding credits?

A. That is correct."

(R-2 p. 209, lines 10-19.)

We ask the Court to consider the following significant statement by the witness:

"Mr. Johnson. I will ask you, Mr. Englund, your reasons for concluding that the taxpayer's Chinese books and records were inadequate for the purpose of computing his correct taxable net income for this period?

A. It appeared that the taxpayer's books and records did not contain complete information with respect to all his transactions. In other words, he made transactions that were not recorded, *which he stated were not recorded in his Chinese books and records.*"

Extra-judicial statements by the appellant again—the sole basis for the claim of inadequacy of the books!!

"A. The taxpayer's books and records did not show the purchase of this building—I mean the records that he submitted to us, other than the cancelled checks.

Mr. Pierce. What records do you mean?

A. The records that—those records that you just introduced in evidence since——

Mr. Pierce. How do you know they don't?
A. He said they didn't."
(R-2 p. 194, lines 18-25.)

Later in his examination it became evident that all the taxpayer had told Englund was that the purchase of the building did not appear as a purchase by the partnership in the records of the Palace Market. (R-2 p. 196, line 8.)

Of course, there would be no such record. The building was not a purchase of the business. It was purchased by Chan personally and he did have record of it in his cancelled checks, and also in the special book which he kept for his individual records, the black book which was later introduced in evidence as Defendant's Exhibit "D".

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**THE CHINESE WRITTEN LANGUAGE.**

The first reason expressed by special agent Englund for disregarding the books and records of the appellant in favor of the artificially constructed "net worth-expenditures" balance sheet was the fact that the Chinese books and records could not be translated by their Chinese interpreter, Victor Chin. (R-2 p. 156, line 1; R-2 p. 158, line 23.)

The following are the facts of the matter:

Lincoln K. Chan testified:

"Q. Do the different dialects use a different written language, or the same written language?

Mr. Seawill. I am going to object that it is irrelevant, immaterial what language the Chinese write in. Nobody has questioned it.

The Court. Overruled. You may answer.

A. Well there is only one writing, as far as I know.

Q. * * * That is all you have ever seen?

A. That's right."

(R-2 p. 341, lines 12-21.)

Lila Lowe testified:

"Q. By the way, from what you know about the Chinese language, do they have different writing for different dialects, or is the writing the same?

A. The writing is the same."

(R-3 p. 683, line 19.)

The fact that the Chinese, although they speak in many different dialects, have but one written language common to all sections of the country and to all dialects, is a matter of which this Court will take judicial notice.

The article on "Chinese Language" in Encyclopedia Brittanica (Vol. 5, 1948 Ed., p. 567) after referring to the many dialects, states:

"The dialects proceed from the same parent stem, are spoken by members of the same race, are united by the bond of writing, the common possession of all * * *"

On page 570 the same author says:

"The characters are a potent bond of union between the different parts of the country with their various dialects * * *"

THE AUDIT MADE OF APPELLANT'S BOOKS.

The investigation of the government into appellant's financial affairs was commenced in March 1947. His books were taken by the special agents of the Internal Revenue Department and were kept for a year. (R-3 p. 649, line 20.)

In March of 1949, or April, Mr. James Soohoo and Mr. Willis Gee, accountants, were employed to make an audit of the appellant's books and records. (R-3 p. 758, line 24.)

They made this audit, and it was furnished to the special agents of the government. They had access to the same records that the agents had had possession of for over a year, the cancelled checks, the bank accounts, the bank statements, the daily reports in Chinese and English, the Chinese journal and ledger. (R-3, p. 757.) With the exception of three or four checks all the checks were at hand, and the absence of those four was offset by the bank statements. (R-3 p. 757, line 21.) Summary translations were made of the Chinese books. Like Mr. Englund, Mr. Soohoo does not read Chinese. (R-3 p. 759, lines 1-25.) They didn't have to use the English portion of the daily records since the Chinese portions and the translations were complete. They found the records complete for every day of every year. (R-3 p. 762, line 3.) They had before them the income tax returns. (R-3 p. 763, line 22.)

They made work sheets on the basis of which their audit was prepared. (R-3 p. 776, line 10.) The audit when completed was presented to appellant and to

special agent Krause of the Internal Revenue Department. (R-3 p. 777, line 12.)

A balance sheet was prepared based upon the findings of this audit. (This balance sheet is in evidence as Deft's. Exhibits AA, BB and CC, and because of the importance thereof the audit is set forth in an appendix to this brief.)

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1943

**ASSETS AND LIABILITIES OF THE PALACE MARKET JANUARY 1, 1950. (EVIDENCE OTHER THAN EXTRA-JUDICIAL ADMISSIONS.)**

1943

At the beginning of period, January 1, 1950, the business kept cash on hand of approximately $1,000.00 (R-2 p. 482, line 25 to p. 483, line 3) and approximately $2,000.00 in the office safe. (R-2 p. 483, line 12.)

At the same date there was cash in the bank according to the adjusted bank balances of $579.58. (R-2 p. 781.)

The business inventory was approximately $500.00. (R-2 p. 485, line 4.) The value of equipment was $500.00. (R-2 p. 485, line 22.) The business owned nothing else then. (R-2 p. 488, line 25.) The total assets of the business were thus $5,079.58.

The liabilities of the business on January 1, 1943 were as follows:

Jack Chan stated that the business owed him $8,100.00 then. (R-2 p. 489, lines 14-21.) These back wages had been accumulating since July, 1940. (R-2

p. 600, line 25.) The business also owed him other money, a total of $4,658.24 for advances which he had made to the partnership as follows: appellant put a mortgage on his house for $2,000.00 and put the money into the business. Then when the North Sacramento market was opened by the partnership he sold the house, received a net of $1,000.00 and put this into the business. The balance of $1,658.24 was obtained from loans on his life insurance. (R-2 p. 490, line 7 to p. 492, line 19.)

The business owed the Hip Hing Company of San Francisco $300.00 on January 1, 1943, money which had been borrowed in 1941. (R-2 p. 492, line 21.) Lai Ching Low who was a witness also mentioned this loan. (R-2 p. 441, line 4.) There were no other liabilities owed by the business January 1, 1943. (R-2 p. 493, line 7.) Total liabilities therefore were $13,058.24.

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**ASSETS AND LIABILITIES OF JACK CHAN INDIVIDUALLY JANUARY 1, 1943. (EVIDENCE OTHER THAN EXTRA-JUDICIAL ADMISSIONS.)**

Jack Chan had no cash on hand on January 1, 1943—all of the bank accounts were business accounts. (R-2, p. 494, lines 4-25.) Of course, the indebtedness of back wages of $8,100.00 owed by the business to Chan and the $4,658.24, were assets of appellant. As accounts receivable, appellant had owed to him $3,600.00 of which a partner Lai Chung Nam owed him $1,000.00, Chong Quong owed him $1,000.00, Chan Tim $1,000.00, Chan Pon $400.00 and Chan Lai

$200.00. (R-2 p. 495, line 11 to p. 498, line 11.) He owned war bonds in the sum of $243.75. This was covered by stipulation. In 1943 Chan had an Oldsmobile automobile later sold for $450.00. Its value January 1, 1943 was therefore at least that amount. (R-2 p. 505, line 12 to p. 506, line 15.) He owned other items the value of which was stipulated to: personal jewelry $1,000.00, home furnishings $500.00. He also owned life insurance on which he had borrowed $4,172.62 and which was therefore worth at least that amount. (R-3 p. 854, lines 1-16.)

Appellant's liabilities January 1, 1943 were as follows:

Appellant had borrowed the sum of $1,000.00 from J. B. Johnson in 1940 which loan was still outstanding in 1943. This money was used for the trip to China. (R-2 p. 506, line 20 to p. 507, line 14.) Since the cash value of his life insurance is listed as an asset the loans against it must be carried as a liability. (R-3 p. 854, lines 1-16.) Also he had a partner's liability for the deficit (excess of liabilities over assets) in the sum of $1,695.73. Thus on January 1, 1943 his individual assets were $22,724.61, his total liabilities were $6,868.35 and his net worth $15,856.26. (See Appendix p. ii.)

**ASSETS AND LIABILITIES OF PALACE MARKET AND/OR APPELLANT JANUARY 1, 1943, AS BUILT UP BY PROSECUTION THROUGH CLAIMED EXTRA-JUDICIAL ADMISSIONS.**

As stated above as its principal witness, the prosecution offered special agent C. L. Englund. We have shown how he (1) disregarded the partnership because Mr. Chan had told him "1941 all partners, everybody dropped out of business" and (2) disregarded all the books and records of appellant as inadequate principally because Mr. Victor Chin, his interpreter, had told him that portion which was in Chinese had been written in a different dialect. Mr. Englund then proceeded to use the "net worth-expenditures" method of proving income tax evasion and built up the appellant's beginning net worth (January 1, 1943) as follows:

(All of the prosecution's evidence in this connection was cumulated in Plaintiff's Exhibit 39.)

First of all, as Chan's cash on hand, the agent took the sum of $350.00 *which he said appellant had said* was the amount usually kept. (R-2 p. 54, line 18 to p. 55, line 22.) Then *he said that appellant had said* that he usually kept about $1,000.00 in the safe. (R-2 p. 57, line 2.)

As to cash in banks we had a stipulation and the bank statements were also in evidence. However, the bank balances had to be adjusted for checks which were outstanding on January 1, 1943. Our stipulation did not cover errors made by the government in the adjustment. The correct adjusted balance for January 1, 1943 by checking the statement of the bank

against the cancelled checks (then outstanding) was $579.58. The government nevertheless used as this figure $1,333.97. (R-2 p. 59, line 11.) The prosecution listed no personal accounts receivable for appellant as of January 1, 1943 and $500.00 as business accounts receivable. This was based solely upon what agent Englund *said that Mr. Chan had said.* (R-2 p. 65, lines 3 to 19.) Also the agents *said that Mr. Chan had said* that the accounts receivable of the business averaged about $500.00. (R-2 p. 66, line 7.) The value of war bonds, $243.75 was also stated on the basis of what the agent said that Mr. Chan had said. (R-2 p. 71, line 5.) However, in this case the statement was correct and we believe it was stipulated to. The inventory was taken from the partnership return showing inventory in the sum of $500.00. (R-2 p. 83, line 1.) The value of equipment was stated at $22,009.50. This was based solely on what the agent *said appellant had said was the value.* (This figure was manifestly an absurdity. The equipment was old and dated back to 1933 when the total of all capitalization of the partnership was only $25,000.00. Appellant's testimony at the trial showed it was only worth $500.00. (R-2 p. 485, line 4.) (Although the use of this absurd amount was immaterial from an accountant's standpoint since it was carried out through the whole period, it served to swell the figure of the appellant's total net worth at the end of the period—given to the jury as $83,113.11 and therefore gave the jury an entirely erroneous impression of this net worth. That was undoubtedly why it was used since anyone could

have seen by casual glance that the equipment was worth no such figure.) The value of furnishings fixed at $1,000.00 was again merely *what the agent said Mr. Chan had said* was its value. (R-2 p. 86, lines 5-12.) The value of personal jewelry was fixed at $1,000.00. This also was based entirely upon *what the agent said appellant had told him it was worth.* (This is the second item which the agent correctly reported.) This list of assets, based entirely upon hearsay and including the fictitious figure of $22,009.50 is $27,937.22.

It is when we turn to the liabilities that we get the staggeringly distorted picture. Listing of course all business debts as appellant's debts the agent takes first the debt of the Palace Market to Hip Hing Co. in the sum of $300.00. This was based upon *what the agent said appellant had said* he owed. (R-2 p. 93, lines 14-24.) So also with the debt to J. B. Johnson, $1,000.00, the agent said that Chan said this was owed. (R-2 p. 95, line 9.) (Both of these debts WERE owed but the Hip Hing debt was owed by the business as the evidence clearly shows.) It is the next items, however, which completely confuse the picture. The testimony is as follows:

> "Mr. Johnson. Now during these conversations with Mr. Chan, did he tell you anything about any other accounts payable he had?
>
> A. Yes, sir.
>
> Q. What was the next one?
>
> A. He had an account payable to Mr. Chin Wing.

Q. What did he tell you about that?

A. He said he owed Chin Wing $4,800.00 on a debt acquired in the early thirties, and the debt was still outstanding December 31, 1942 and that he paid the amount in 1946.

Q. Did he produce a check by which payment was made?

A. He did."

(R-2 p. 96, line 14.)

Now, it has been shown above that Chin Wing was appellant's uncle and a partner in the business who had died in 1928, owning an interest in the business of $2,000.00; that his son Chin Him was listed as the representative of the family in succession of the family interest, that in 1946 when the widow Mrs. Chin Wing desired to be paid off she received this amount plus assignments of other partners' interests. There was no dispute about this. Chan had so informed Mr. Englund.

"Q. What did Mr. Chan tell you about Chin Wing's relationship to the business?

A. Chan stated that that check represented a payment that he had made to Chin Wing. Chin Wing had been a former partner of his—was a partner with him in about 1923 and Mr. Chin Wing had dropped out of the partnership in 1932, that he had paid his liability to Chin Wing in 1946 with that check."

(R-2 p. 147, lines 1-5.)

All of the partnership returns 1943-1945 list Chin Him, the son, as the partner. These returns were available to and presumably studied by the agents, although

from their testimony it would appear they evinced a singular lack of curiosity throughout their investigation as to the identity and interests of the several partners.

The so-called indebtedness of appellant to Chin Wing *having thus been fixed by the hearsay testimony* of the agent, the next hearsay is with reference to a claimed account owing to Quok Brothers, $2,600.00. Mr. Englund said that Mr. Chan said that he owed Quok Brothers this amount in 1943 and discharged it in 1946. (R-2 p. 97, line 23 to p. 98, line 3.) It will be remembered that the Quok Brothers (one of whom is also known as Fok Wah), were the sons of Fok Chung also known as Foo Chong, also known as Fok Yuen Cheong.

The fact that this hearsay was completely refuted by the following written agreement between the parties was a source of no embarrassment whatever to the agents.

> "This is evidence that I am now presenting my late father Fok Yuen Cheong's bequeathed share of $2,600.00 American money in the Palace Market * * * I am yielding the entirety of this share to be bought by Chan Jock Wei. After April 8, 1946, any profits or losses of the business will be shared or borne by Chan Jock Wei * * * one half of the share which $1300.00 must be paid first. The remaining half of the $1300 to be paid before May 8, 1946."

The letter is dated April 4, 1946 signed by "Fok Wah".

The first check was dated April 8, 1946, the second check was drawn May 8, 1946. These are the checks which the agent said appellant had said were in payment of a debt owed in 1942! (R-2 p. 98, lines 9-17.)

Thus far the agent through "admissible hearsay" has created debts of $7,400.00 owed by appellant on January 1, 1943. The next step was to "blanket in" $20,000.00 more in debts.

> "Mr. Johnson. Q. Did Mr. Chan tell you that he had any further accounts payable?
>
> A. He did.
>
> Q. What was the nature of that liability?
>
> A. He said that he was indebted to various former business associates in the amount of $20,000.00 which he had reduced during this period 1943 to 1946 to $10,000.00."
>
> (R-2 p. 98, line 23 to p. 99, line 4.)

It is fairly obvious by now that Mr. Englund's characterization of what appellant told him is a little broad. When pinned down to ACTUAL CONVERSATIONS all that the appellant ever said was " '41, all partners, everyone dropped out of business".

The total liabilities are thus stated to be $28,700.00, every cent of which is built up upon appellant's claimed extra judicial statements, and since the assets are built up the same way we have a beginning net worth of minus $762.78 constructed in complete disregard of the books and records and built solely out of the sands of Mr. Englund's recollection of what the appellant told him.

**ACQUIRED ASSETS AND LIABILITIES OF APPELLANT AND THE PALACE MARKET 1943-1946.**

As to the acquired assets of appellant and of the Palace Market during the period 1943-1946 there is little conflict in the evidence.

"Cash on hand" and "in the safe" remain constant throughout the period. "Cash in bank" is based upon adjusted bank balances and although there are differences between the figures stated by the plaintiff (Plaintiff's Exhibit "39") and defendant (Defendant's Exhibit "AA" Appendix) these differences are not material.

The business accounts receivable remained constant. On December 13, 1945 appellant loaned the Bing Kong Tong $500.00. In 1946 when according to appellant he bought out his partners, the debt of $3,600.00 owed by them was wiped out. (R-2 p. 501; R-3 p. 852, lines 1-18.)

There were small increases in war bonds; an automobile was purchased for $1,100.00, the amount of personal jewelry remains constant, as do the life insurance policies; there is a small increase in the value of home furnishings, and the inventory and equipment at the market increased in value to a small extent. (Pltf's Exhibit 39; Defendant's Exhibits AA and BB, Appendix.)

In 1944 appellant individually bought the building in which the Palace Market is located. The facts with reference to this purchase were stipulated to and are embodied in Plaintiff's Exhibit 12. The purchase price was $57,500.00. Appellant made a down payment of

$15,000.00 and there were two secured loans against the premises which totalled $42,500.00. The second loan was paid off in 1944, the total paid being $7,702.86, interest was paid on the first loan. This note was reduced by $10,000.00 in 1945, and by an additional $5,000.00 in 1946.

In 1943 appellant acquired a dwelling in Sacramento for which he paid $6,767.42. (Pltf's. Exhibit 11.)

In 1944 appellant bought a lot for $100.00. He made improvements on this lot of $251.20. (Deft's. Exhibit BB.)

Where did he get the money with which to make these purchases? If the theory of the prosecution is correct and the evidence justifies the conclusion that the partnership had been dissolved by a meeting held in 1941, and that the appellant then became the owner of all of the business (for which he admittedly did not pay until 1946 and after) then the money came from appellant's earnings.

If, on the other hand, the partnership was still in existence during the period 1943-1946 the following is the explanation of the acquisition of these assets.

Defendant employed and called to the stand as its expert a Sacramento certified public accountant, George Harbinson. He checked the books and records of the appellant and the audit made by Mr. Soohoo.

He gave the following testimony:

> "the partnership started with a liability of over $12,000.00 to Jack Chan. At the end of this period

Jack Chan owed the partnership $36,000.00 or in other words, there was a change from a decrease of $12,000.00 on the one hand to an increase of $36,000.00 on the other hand of over $48,000.00 that was taken out of the partnership over and above the partnership salaries and the building rentals * * * this balance sheet was built up by taking the treasury figures and building up through your salary and your rental income to show that Mr. Chan was actually able to accumulate this building, his house, his automobile by withdrawals from the partnership * * * by borrowing from the partnership." (R-2 p. 1001, line 23 to p. 1002, line 21.)

The whole financial picture of the assets and liabilities of Jack Chan and the Palace Market are graphically set forth in Defendant's Exhibits AA, BB and CC, Appendix. Most of the items of this balance sheet have already been explained. The use of "clearing accounts" should receive a word of explanation. Mr. Harbinson explained the "clearing account, other partners" as follows:

"These clearing accounts of other partners represented the partner's share of their food and donations that was consumed each year and it was charged in the partnership return as a donation. This was set up so as to catch—this was set up as an amount due (from) the partners—in effect that would be an advance to the partners of their share of the food and their share of the donations."

(R-3 p. 992, lines 12-20.)

He also explained "clearing account, Jack Chan":

"At the end of 1942 the Palace Market owed Jack Chan $4,658.24 in a clearing account and $8,100.00 in back wages. Now at the end of 1943 Mr. Chan had withdrawn over and above his partnership salary $1,806.08 * * * Bear in mind that Mr. Chan's bookkeeping was on a single-entry system. Now if Mr. Chan had converted his system into a double entry system, this is the way this item would appear * * * and the various items of expense in 1943 * * * which he withdrew and the various checks are actually charged against Mr. Chan's account as personal withdrawals. Then against that he was credited with his salary, and in later years also the rental income from the building * * * In the year 1943 he was actually charged with $16,833.07 * * * those represent his withdrawals and against that you have the various items of salary accrual and the car that he put in the business so the difference after picking up your * * * increase * * * at the end of 1943 Mr. Chan owed the Palace Market $1,806.08."

(R-3 p. 993, line 21 to p. 994, line 24.)

Mr. Harbinson explained the figures in 1944 as follows:

"Q. * * * Now let's take the figure at the end of December 31, 1944. I note that Jack Chan owes the partnership $19,734.81. Will you explain how you arrived at that figure?

A. Yes. In 1944 the total withdrawals by Mr. Chan were $28,813.73 * * * we have these classified * * * into $274.85 for his personal account, then $351.86 for the board which we charged him for, then the sum of $63.00 for donations * * *

$5.50 for a bank charge, and $24,118.52 for the amount which he withdrew to make a down payment on the building * * *

Now, against that amount Mr. Chan—his partnership salary was $4,260. He also cashed war bonds * * * $937.50. He collected on his building rents, * * * He also was loaned by his wife, $2,000.00, and his rent * * * for * * * the Palace Market was $1,687.50.

Q. * * * And you find then, the net withdrawals were $19,734.81 is that correct?

A. That is correct."

(R-3 p. 997, line 18 to p. 998, line 22.)

The witness showed that similarly in 1945 appellant drew a total of $18,573.32 from which would be offset his salary and rentals. (R-3 p. 999, lines 3-9.)

In 1946 there were withdrawals of $22,245.67 and after credits, the accumulated total was $36,058.80. (R-3 p. 999, lines 13-23.)

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**EXPLANATION OF "EQUITY IN PARTNERSHIP DOES NOT REFLECT GAIN IN BOOK VALUE".**

There had been left off the balance sheet the increase in the book value of the partnership resulting from the purchase of an increased interest in the partnership in 1945 and 1946. The reason for this was explained by George Harbinson, the C.P.A. The purpose of the balance sheet was to show the increase in net worth which resulted in taxable income. Since the acquisition of a capital asset is not taxable income

and no tax is payable thereon until the asset is disposed of, the inclusion of that increase of net worth due to such acquisition would have been a false element in the case. (R-3 p. 1057, line 16 to p. 1058, line 5.)

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**COMPUTATION OF NET WORTH ON BASIS OF PALACE MARKET BALANCE SHEET.**

A most significant document in this case is Defendant's Exhibit "CC", Appendix.

It will be recalled that the special agents' computation was drawn up based upon the assets of the business treated as being solely owned by appellant. In Exhibit CC taxable net income was shown, also using the balance sheet of the Palace Market, but unlike the special agents' the business was assumed to be a partnership and the books and records were used.

There are some questionable percentages used in this tabulation WHICH HOWEVER DO NOT AFFECT THE RESULTS IN THE SLIGHTEST. Mr. Chan's interest in the partnership in 1943 was assumed to be 50/250ths. Actually in 1943 there was only a total capitalization of $22,500.00. The partnership return for the year 1943 shows the list of partners (Plaintiff's Exhibit 5) and Mr. Chan's interest is stated at 50/250ths or 1/5th. This interest was the interest used by the accountants and was apparently not seriously questioned.

Taking the partnership income as the basis each year, appellant's proportion thereof was set forth,

his salary was added, his individual income was added, his wife's share was deducted, his reported net income was deducted and the net difference was shown. Thus it was shown that if the partnership were in existence as claimed by appellant the total deficiency of income reported over a period of four years was only $3,693.97.

This deficiency was explainable to mistakes by appellant in his method of income tax accounting.

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**THE ERRORS MADE BY APPELLANT IN HIS INCOME TAX ACCOUNTING.**

Appellant's bookkeeping methods were not perfect. Like many small businesses the Palace Market had a single-entry system. It has been described above. The meaning of "single-entry" was also described by Mr. Harbinson:

> "The single-entry system is a system whereby the operations of the business are recorded by receipts and disbursements only. There is no attempt made in the single-entry system to tie in your asset-liability and net-worth accounts, and so you have * * * your receipts and disbursements on the one hand and your assets, liability and net worth accounts on the other hand, but there is no attempt to tie these two together as there is in the double-entry system."
>
> (R-3 p. 979, lines 10-17.)

> "Also on a single-entry system there is no check for errors, because of the fact that you don't have

two self-balancing sets of accounts like you do in a double-entry system. You cannot readily check your errors."

(R-3 p. 979, lines 18-21.)

The weaknesses of the system were described by the witness:

"I would say that it had definite weaknesses * * *

"* * * The first weakness is in the method of handling charge sales * * * Mr. Chan did not ring up his charge sales in the register * * * he didn't have a charge sale key. Similarly when a customer came in and paid his account, it wasn't rung up in the register, but merely filed on a spindle and added at the end of the day * * * if the tag was forgotten there would be no way for Mr. Chan checking that that 'received on account' would be added in that day's total * * *

"* * * There was one other weakness in that system * * * His total sales were listed, and then he also had cash pay-outs for various items * * * which every business has. If you subtract the cash pay-outs from your total sales, or total cash receipts, if that would be clear, you would arrive at the net amount of cash which is available at the bank.

"Now most businesses of any size take that net amount of cash and deposit it in cash the next day to the bank thereby keeping control of the cash. Mr. Chan * * * took the total in the cash register, subtracted his pay-outs and then put the difference in his safe and banked the balance as he got too much money * * * and thereby there

would be no control to see whether all that net cash went into the bank, or whether it didn't go into the bank, so if there were mistakes in banking those would not be readily ascertainable * * *''

(R-3 p. 979, line 25 to p. 982, line 9.)

The system used by appellant was not unusual:

"In many of your smaller businesses, such as meat markets, gas stations, and similar businesses of this nature where the proprietors are rather ignorant of bookkeeping you will find the system rather general."

(R-3 p. 982, lines 13-16.)

There were certain obvious errors in the partnership returns all of which were readily determinable by reference to the books and records.

For example, in 1943 as a deduction for the expense of business, appellant listed "labor—$6,315.00". This included the labor of employees and this was correct. However $5,000.00 was included for the wages of working partners and this is not a proper income tax deduction. (R-3 p. 1010, line 12 to p. 1011, line 11.) This is a common error. (R-3 p. 1011, lines 12-17.) Similarly partner's board and lodging was taken as a business expense. (R-3 p. 1013, lines 1-25.)

Also appellant listed as repairs certain items which would probably be classified as capital expenditures. (R-3 p. 1011, line 22.) However during the entire period he took no depreciation on such expenditures so that over the useful life of the article this would balance itself out. (R-3 p. 1012, lines 1-25.)

Certain of these mistakes would not have been reflected in the computation of appellant's net income. Part of them would as to appellant's share. (R-3 p. 1017, lines 1-15.)

These mistakes would account for the total deficiency in the totals returned by appellant over this period of four years.

There was no evidence of wilfullness in any of these mistakes.

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## ARGUMENT.

### INTRODUCTION.

It will be our purpose to prove in the argument to follow that the evidence does not support the conviction.

We will first show that the complete dissolution of the admittedly previously existing partnership was the outstanding fact of this case, the link of the chain of the prosecution's case upon which every other link depends.

We will show that if there was a partnership, then all moneys which appellant used to acquire the assets which were acquired and which moneys the government insisted were "gross income" were moneys which the appellant was (and probably still is) obligated to repay to his partners and therefore *not* "gross income".

We will show that there was never any dissolution of the partnership—that the evidence upon which the

prosecution relied to show a dissolution was such that not even a *prima facie* case was made and that the evidence of the defense refuting the claimed dissolution was so complete and convincing that as a matter of law the prosecution has not sustained its burden of proof.

We will also show that in using extra-judicial admissions as the basis for preparing and presenting a "beginning net worth" balance sheet, the prosecution has failed to sustain its burden of proof and we will further show that where the taxpayer has a complete set of books and records which he turns over to the investigating agents and which contain all of his financial transactions, the prosecution does not sustain its burden of proof where it disregards those books in favor of extra-judicial admissions.

At the outset it will be seen that this "Chinese partnership" although unquestionably a general business partnership within the Uniform Partnership law (which is a part of the law of California) also—in the eyes and minds of the Chinese members, partook in many respects the characteristics of a corporation.

Each partner was issued a share certificate and these shares represented a very definite total of a fixed capitalization in the partnership. It was as if each share had a "par value" and represented a fixed and definite sum of money. Another characteristic which in the minds of the Chinese members was analogous to the corporation was the idea of succession. While, of course, in the contemplation of law each death operated as a dissolution of the partnership, it was not

treated as such by the Chinese; so that when such a death occurred, or a withdrawal, the partnership went right on carrying on its business as usual.

These facts are significant in the discussion of the claim of a dissolution of the partnership hereinafter.

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**PROOF OF A COMPLETE DISSOLUTION OF THE PARTNERSHIP BEFORE 1943 WAS AN INDISPENSABLE PART OF THE CASE OF THE PROSECUTION. WITHOUT SUCH PROOF MONEY USED BY THE APPELLANT TO ACQUIRE HIS ASSETS WAS "COMPANY MONEY" ON WHICH NO INCOME TAX IS PAYABLE.**

It was the theory of the prosecution that from a beginning net worth of minus $762.78 in 1943 appellant's net worth at the end of 1946 increased to $83,-113.41 which constituted an increase of his assets over his liabilities during the period from 1943-1946. (Plaintiff's Exhibit 39.) It was the theory of the prosecution that this money had all come from sales of the business. Obviously, this was the only source from which it could have come. In other words all moneys to which the appellant had access were moneys received from sales made in the Palace Meat Market.

Now, if the Palace Market was solely owned by appellant during this period then all of such money was his "gross income"; and should have been reported as such in his individual income tax return; and a tax should have been paid thereon.

On the other hand, if the Palace Market was a partnership during that period, as claimed by appellant

and as the partnership returns show and appellant's individual returns reflect, then the only portion of the sales receipts which appellant was required to return is that portion which constitutes his share of the net profit and his wages. These, he did report (with the mistakes above noted).

Also, and this is equally clear, any moneys which appellant "over-drew" from the partnership funds in excess of his salary and his share of the profits was not "gross income".

Section 22(a) of the Internal Revenue Code (26 U.S.C.A. Sec. 22(a) defines "gross income" as "gains, profits and income derived from salaries, wages or compensation for personal service", etc. but it does not include loans or overdrafts.

> "A taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain and (2) the absence of a definite, unconditional obligation to repay or return that which would otherwise constitute a gain."
>
> *Commissioner v. Wilcox,* 327 U.S. 404, 90 L. Ed. 752, 166 A.L.R. 884, 66 S. Ct. 546.

Conceding the existence of the partnership, any moneys which appellant drew therefrom in excess of the moneys to which he was entitled as a salary or as net profits were not his moneys; they were moneys which belonged to his partners. They were "loans" and no more the subject of income taxation than are loans received from a bank.

Even if it should be contended that these moneys were not borrowed but embezzled, the result would be exactly the same.

In *Commissioner v. Wilcox* (Feb. 25, 1946), 327 U.S. 404, 90 L. Ed. 752, 166 A.L.R. 884, 66 S. Ct. 546, the taxpayer had been employed as a bookkeeper for a transfer and warehouse company, had embezzled about $12,000.00 of the company's money and converted it to his own use. It was claimed by the commissioner that these embezzled moneys constituted gross income as defined by Section 22a of the Internal Revenue Code. The Circuit Court of Appeals had reversed the Tax Court decision so holding. The United States Supreme Court, per Mr. Justice Murphy, held, on page 887 of 166 A.L.R.:

> "We fail to perceive any reason for applying different principles to a situation where one embezzles or steals money from another. Moral turpitude is not a touchstone of taxability. The question, rather, is whether the taxpayer in fact received a statutory gain, profit or benefit. That the taxpayer's motive may have been reprehensible or the mode of receipt illegal has no bearing upon the application of Section 22(a).
>
> It is obvious that the taxpayer in this instance, in embezzling the $12,748.60, received the money without any semblance of a bona fide claim of right. And he was at all times under an unqualified duty and obligation to repay the money to his employer. Under Nevada law the crime of embezzlement was complete whenever an appropriation was made; the employer was entitled to replevy the money as soon as it was appropriated

or to have it summarily restored by a magistrate. The employer, moreover, at all times held the taxpayer liable to return the full amount. The debtor-creditor relationship was definite and unconditional. All right, title and interest in the money rested with the employer. The taxpayer thus received no taxable income from the embezzlement."

(There is a dissent in this case.)

See also:

*McKnight v. Commissioner,* C.C.A. 5th Ct. 1942, 127 F. (2d) 572.

We do not concede that the moneys "overdrawn" by appellant in this case were embezzled. Appellant at all times has recognized and now recognizes his obligation to account. (R-3 p. 615, lines 3-7.) As a matter of fact it is not clear from the evidence that appellant ever had an exact realization of just how much of the moneys taken by him constituted overdraft. (R-2 p. 538, lines 2-8.)

The status of appellant's appropriation of funds in excess of his partner's interest in the net profits of the partnership and his salary (which were reported) is of no concern in this case.

This does make it clear, however, that unless the prosecution has sustained the burden of proof that the partnership was dissolved prior to the commencement of this period, 1943-1946, then there is no case of income tax evasion.

The next step of this argument will be to establish that this burden was not sustained.

THE PROSECUTION DID NOT PROVE DISSOLUTION OF THE PARTNERSHIP. THE CLAIMED EXTRA-JUDICIAL "ADMISSIONS" WERE NOT ADMISSIONS AT ALL.

The method of the prosecution to prove the dissolution of the partnership was by putting special agent C. L. Englund of the Internal Revenue Department on the witness stand. He related what he said the appellant had told him about the dissolution of the partnership. The only testimony which he gave at all which had any probative value was evidence that a sworn statement had been taken from appellant in January 1948. This sworn statement was introduced in evidence. It is undoubtedly a correct transcription of the questions that were asked and the answers that were given at that time.* We will discuss this statement hereinafter.

In addition to the sworn statement, the agent, as has been shown, above gave certain summaries or characterizations of what he said that the appellant had told him. He did not give the actual statements that were made, or even the gist or substance of these statements. He only gave his oral summarization, or characterization, of the impressions he had gained of the appellant's statements during the some twenty conferences which he had had with appellant.

We have set forth (supra p. 31, et seq.) the testimony of Mr. Englund relating to the claimed extrajudicial admissions of appellant with some de-

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tail. He testified that appellant had characterized the partnership as "a former Chinese partnership." "He said it was discontinued in 1941." None of the above was given in testimony as any specific conversation but simply as the witness's recollection of the effect of a number of them.

On pages 101-103 Mr. Englund related the dates of a number of conversations which he had had with appellant but didn't state anything that was said specifically in any of them (although the witness purported to keep a diary showing notes of all conferences). Then he said:

> "A. We had conferences throughout this period with Chan, and occasionally the partnership was brought up * * *
>
> Mr. Johnson. Do you recall the exact dates of those conferences now, Mr. Englund?
>
> A. No, sir, I don't."
>
> (R-2 p. 103, line 21 to p. 104, line 2.)

This didn't stop the witness from giving an oral summary of his recollection of those conversations.

This method of proving dissolution of a partnership by extra-judicial conversations was objected to, our objection was overruled and by stipulation and in order not to impede the progress of the trial it was understood that our objections went to each question and answer covering such conversations. (R-2 p. 48, line 19 to p. 49, line 8.)

It will be obvious that under the method of interrogation followed by the prosecution we didn't even

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It will be obvious that under the method of interrogation followed by the prosecution we didn't even

have the benefit of pinning the witness down to specific conversations, covering specific statements. All that we got were oral generalizations summarizing the witness's understanding and remembrance of what had been said.

The same method of interrogation was adopted by the prosecution in examining the witness, Mrs. J. F. Devine, whose testimony has been reviewed in the statement of facts. (Supra pp. 36-37.)

Typical of her vague generalizations are:

> "In 1932 there was again a change of partners * * * Some dropped out and new ones came in and there were various changes of partners until they dropped out in 1941 * * * only the original investments were repaid. At no time were the profits divided * * * and his conversation was the partners that worked in the store received salary. Those who did not or were silent partners, they didn't receive anything except their original investment when they withdrew from the partnership."
>
> (R-2 pp. 227-228.)

This method of interrogation is improper.

In *O'Neill v. United States* (C.C.A. 8th Ct., April 22, 1927), 19 F. (2d) 322, the defendant was convicted of violation of the Harrison Anti-Narcotic Act. One of the agents made a summary of the statements made by the defendant O'Neill in response to the questioning of the officers. This summary or digest was offered and received in evidence over the objection of O'Neill's counsel.

The judgment of conviction was reversed, with the Court saying, on page 325:

"The introduction in evidence of the summary, which Manning (the agent) prepared of the statements given by O'Neill, is also assigned as error. Statements and declarations by an accused, from which, in connection with the evidence of surrounding circumstances, an inference of guilt may be drawn, if shown to have been made voluntarily (citing cases), are admissible against him as admissions (citing cases). But the proof offered to establish such statements or admissions ought to show, at least, the substance and effect of the statement, *and not a mere digest or summary thereof.* Grubey v. National Bank of Illinois, 35 Ill. App. 354. *It is a well settled principle of the law of evidence that a witness who has heard a statement or conversation should not be permitted to state his conclusions as to what was stated or admitted.* Atchison v. King, 9 Kan. 550; Mather v. Parsons, 32 Hun. (N.Y.) 338, 345, 346; Wolverton v. Saranac, 171 Mich. 419, 137 N.W. 211, 212; Irwin v. Nolde, 164 Pa. 205, 30 A. 246; Snell v. Snow, 54 Mass. (13 Metc.) 278, 282, 46 Am. Dec. 730; Henderson v. Brunson, 141 Ala. 674, 37 So. 549; McKee Live Stock Co. v. Menzel, 70 Colo. 308, 201 P. 52, 53; Boone v. Rickard, 125 Ill. App. 438; Grubey v. National Bank of Illinois, supra. The summary prepared by Manning and introduced in evidence in the instant case was neither a verbatim transcript of what O'Neill said, nor the substance and effect of what he said. *It was not O'Neill's statement, but Manning's statement of the conclusions and deductions arrived at by him from the conversation*

*between O'Neill and the narcotic officers. It follows that its admission in evidence was erroneous."*

In addition to the above vague characterizations by the agent of what he claimed the appellant had told him there was a sworn statement taken on January 19, 1948. As above stated there can be no question but that this statement is correctly reported substantially—and it is equally clear it is the only statement worthy to be called a statement.

This statement is the Plaintiff's Exhibit 40. At the trial, in the opening statement, throughout the giving of the testimony, in the arguments, it was clear that it was on the statement that the prosecution hinged its whole claim of a dissolution of the partnership. The portion upon which the prosecution relied occurs on page 9 of the exhibit. We have quoted from this statement at length. (Supra p. 38.)

It is impossible to follow all of the statement which Mr. Chan made following the phrase " '41 all partners, everyone, dropped out of business." It is impossible to tell from the context in some of the sentences whether appellant is referring to the partners or the creditors. But more important, it is impossible excepting for that one phrase to tell to what date the appellant refers. It must be remembered that when the statement was made in January 1948, the business WAS "mostly mine, mostly mine". By that time Mr. Chan had bought out his partners. The only place that there is any mention of a date in the state-

ment "then '41 all partners, everybody dropped out of the business".

This is literally true—during the thirties and until 1940 there were many working partners. Then they commenced to quit the employ of the partnership and go into their own businesses. The Palace Market was heavily encumbered. We construe appellant's meaning as being that in 1941 the partners had quit the employ of the partnership.

It might have been possible to interpret his statement as meaning that in 1941 all of the partners had resigned from the partnership—excepting for one significant fact:

In the following five places in the same statement the appellant shows that the partnership had not been dissolved because he refers to its existence in 1945 and 1946:

(1) "Devine. Q. There were twenty-five partners in 1945 and there were ten in 1946?
A. Yes, mam.

(2) Q. Were all these partners in 1945 (pointing to the partnership return for the year 1945) is this the return you filed * * *
A. Yes.

(3) Is this the names of the partners * * * were they members of the partnership in 1945?
A. Yes.

(4) Q. You have Chin Ling listed. Was he a member of the partnership in 1945?
A. Yes."

There was an earlier reference to Chin Ling. The reporter listed the question and answer as follows:

(5) "Q. What year did Chin Ling leave the partnership?

A. 1935."

(Plaintiff's Exhibit 40.)

It is obvious the witness either said 1945 and his answer was misunderstood, or that he misstated himself. The evidence showed Chin Ling did "leave the partnership" and was paid off in 1945.

Elsewhere throughout the statement the meaning of the witness is clear. In page after page reference is made to the repayment to the partners *"when they left the partnership"*. The checks with which most of these partners were paid off are in evidence. These checks are all issued in 1945, 1946 and later.

"Q. If they left the partnership did they receive their original investment back?

A. Yes."

Also:

"Q. Was their original investment paid back to them * * * when they left the partnership?

A. I pay them."

Reading the entire statement without stripping a single phrase from the context, it is clear without any doubt whatever that the witness was telling the agents, and the agents understood he was telling them —that there was a partnership in 1945 and 1946; that there were twenty-five partners in 1945 and ten in 1946.

If there had been the slightest question about it when the statement was given, there was not a few days later. Mr. Chan was given a copy of his statement and was asked if there were any corrections. He made the following correction on page 8:

"1946 10 partners J. C."

This being clear " '41 all partners, everybody dropped out of business" could only have referred to the employment.

Thus, there is NO extra judicial statement by the appellant in this case that the partnership was dissolved in 1941.

There is one other fact which must be kept in mind in considering all possible rational interpretations of the statement made by, or attributed to the appellant. Mr. Chan is Chinese.

His understanding of spoken English is fair. His ability to express himself in English is very poor. This has nothing to do with his intelligence, nor even with the reputed reticence of the Chinese as a race. It has merely to do with Mr. Chan's ability to convey his meaning to others by the English language.

There was no reticence about appellant's cooperation with the agents throughout the investigation of this matter; nor in his answers to their questions. Nor was there any reticence about his answers to questions on either direct examination or on cross examination during the trial.

But he did have a great deal of difficulty in making himself understood and the court reporter had a great

deal of difficulty in understanding him. He has a slight stutter when he becomes excited and his manner of speaking is explosive. A reading of his testimony which covers several hundred pages of the record will demonstrate this assertion.

The inferences which it would be permissible to draw from a statement "that in 1941 all partners dropped out of the business" if made by an articulate witness are quite different from the inferences which are permissible to be drawn from the same statement made by this witness under the circumstances existing in this case.

However, even if appellant in 1948 had thought that there was a dissolution of the partnership in 1941, his thinking so would not make it the fact.

In every partnership there must be a community of interest. That there was one here throughout the history of this partnership is clear. If the partnership was dissolved in 1941 then by what act—or words—was this community destroyed?

None of the partners who testified at the trial told of any act, negotiations, words by which the partnership was wiped out. All of the written evidence is to the contrary. In 1943, 1944 and 1945 the business was carried on exactly the same as it had been carried on all throughout the 1930s. None of the partners drew down or attempted to draw down their shares, which shares, as we have seen were treated by them as being similar to corporate shares. This was done in 1945, 1946 and 1947 when Mr. Chan says that the partnership was dissolved.

People who have joined general partnerships which have proven unprofitable would be pleased to know, when a creditor comes around and says "pay me" that all one needs to do to terminate a partnership is to say "I am not a partner any more".

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**THE STATEMENTS MADE ARE LEGAL CONCLUSIONS AND HAVE NO PROBATIVE VALUE WHATEVER.**

Let us assume that this were a civil case in equity for an accounting between Mr. Chan and his partners. Would a statement made by one of the partners that "the partnership was discontinued in 1941," "all partners dropped out of the business in 1941," "the business was mostly Chan's," be considered as adequate proof of the fact of dissolution?

As a matter of fact—and of law—the statement wouldn't be considered at all. It is a mere conclusion of law. Whether or not there has been a dissolution of a partnership is a legal question, the answer to which is dependent on probative facts, not conclusions.

A Court in determining whether there had been a dissolution would turn to minutes of partnership meetings, to written agreements, to letters exchanged, and to oral agreements as contained in actual conversations between partners; but the assertions of partners, or one of them, as to a given legal consequence without inquiry into, or disclosure of, the circumstances and acts has no more probative effect than if the statement had not been uttered.

It is not a question of the weight to be given to the utterance. It is a question of its admissibility.

The statement by one not skilled in law of legal conclusions without giving the facts upon which the legal questions are drawn is useless in proof of the ultimate issue.

If, therefore, in a civil case the statement can have no probative value, how can it be said in a criminal case, not only to be admissible but also sufficient in and of itself to prove the fact?

At this point this Court has perhaps become puzzled, as we have been throughout the history of this case, why the prosecution, if it felt that all of the facts could establish to a moral certainty and beyond a reasonable doubt that there was a dissolution of the partnership at a meeting in 1941, satisfied itself with resting its case upon hearsay statements by the appellant of conclusions of law. There were present in the courtroom, subpoenaed by the prosecution, all of the available partners who had been present at the meetings in 1940 and who presumably would have had some part in the claimed meeting of 1941 where the partnership was supposed to have been dissolved. Why were they not called by the prosecution? We called them when we had to assume the burden of proving the defendant innocent.

Certainly the prosecution must know that a dissolution of a business partnership does not occur—as a matter of law—simply because one partner says "I am no longer a partner".

Appellant had offered every cooperation with these agents to give them facts. Why were the agents so singularly incurious to ascertain the FACTS about the so-called dissolution of the partnership? Why were no questions ever asked of Mr. Chan or of George Chan or of Henry Chan (who, by the way, although they have a common name, are in no way related) or of Lai Chung Low or of Harry Young to ascertain whether a meeting had been held, or when, or where, or who was present, or what was said, or where are the minutes, or what arrangements were made for the distribution of assets, or the payment of liabilities, or what conversations were ever held, and between whom, etc., etc.?

The only reason we can ascribe seems to be the obvious one. Mr. Chan had told them five times in his sworn statement that the partnership was in existence in 1945 and they believed him. No further questions were asked because the agents themselves were not misled. They knew that appellant claimed the partnership to be in existence.

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**ASSUMING THE STATEMENTS CONSTITUTED ADMISSIONS THEY WERE INSUFFICIENT TO MAKE A PRIMA FACIE CASE.**

It may be trite to state, but it is a fact which seems frequently to be lost sight of, that the prosecution in a criminal case has the burden of proving that the defendant is guilty to a moral certainty and beyond a reasonable doubt.

If these are not mere words, what becomes of their cogency in this case where the prosecution rested its case on the hearsay—admissible hearsay perhaps, but nevertheless hearsay—statements of the accused—although all the facts were available to the prosecution throughout.

When the prosecution had put in its case there was not one fact in the record which had any probative value which wasn't testimony of what an agent had said that appellant had said. (Moreover, nothing that happened afterwards strengthened the government's case any *either.*)

Giving to the statements made all of the force and effect for which the prosecution contends,—and which we have shown cannot be given them—no rule in American jurisprudence is better settled than the rule that an admission or even a confession is insufficient, unsupported by other evidence, to prove a fact the existence of which must be proven to establish guilt.

It would be profitless and waste of time of this Court to attempt to review all of the case stating this rule.

The clearest exposition of the rule that the defendant cannot be convicted solely upon admissions made by him and that the *corpus delicti* must be established in the case of *Forte v. United States* (C.C.A. District of Columbia, April 5, 1937), 94 F. (2d) 236. In that case the defendant was convicted of transporting a motor vehicle in interstate commerce knowing it to

have been stolen. The Court, in holding that the *corpus delicti* had not been established and reversing the conviction says, on page 237:

> "There is some division in the authorities in respect of the rule of proof in cases involving confessions * * *
>
> * * * * * * *
>
> "Mr. Wigmore concedes, however, that except in a few jurisdictions, the courts in the United States have adopted a fixed rule that corroboration of a confession is necessary. He believes them to have been 'chiefly moved, in all probability, by Professor Greenleaf's suggestion that "this opinion certainly best accords with the humanity of the criminal code and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases." ' 4 Wigmore, Evidence (2d Ed. 1923) § 2071, p. 407. In respect of variations of the rule in the United States, Mr. Wigmore states that 'in most jurisdictions the stricter form of rule is taken, and the evidence must concern the "corpus deliciti": * * *' 4 Wigmore, Evidence (2d Ed. 1923) § 2071, p. 408.
>
> "The conclusions reached by Mr. Wigmore on the one hand, and by Mr. Greenleaf and the greater number of the courts in the United States on the other, differ because they proceed from contrary premises. Mr. Wigmore's premise is that there is little danger of false confessions of guilt. He predicates this upon the proposition above quoted that 'so far as handed down to us in the annals of our courts, [false confessions] have been exceedingly rare.' "

The Court goes on to hold that comprehensive studies made have indicated that the forcing of confessions, far from being rare, are widespread throughout the country. It did not assume that the confession in that case had been forced. It says on page 240:

> "Moreover, there is no suggestion in the instant case that the statement of the appellant that he knew the car was stolen was not voluntary. But the case cannot be decided upon an *ad hoc* basis. The question presented is of first impression here; and we feel bound upon a subject touching so materially liberty, and in many cases life itself, and especially in the criminal law where justice requires equality of treatment in respect of trial procedure and proof, to give weight to the findings of the National Commission, and to follow in adopting a rule for this jurisdiction the rule of the great majority of the courts in the Uinted States—that there can be no conviction of an accused in a criminal case upon an uncorroborated confession, and the further rule, represented by what we think is the weight of authority and the better view in the Federal courts, that such corroboration is not sufficient if it tends merely to support the confession, without also embracing substantial evidence of the *corpus delicti* and the whole thereof. We do not rule that such corroborating evidence must, independent of the confession, establish the *corpus delicti* beyond a reasonable doubt. It is sufficient, according to the authorities we follow, if, there being, independent of the confession, substantial evidence of the *corpus delicti* and the whole thereof, this evidence and the confession are together convincing beyond

a reasonable doubt of the commission of the crime and of the defendant's connection therewith."

After reviewing a number of cases on the question, the Court quotes Judge Learned Hand as follows, page 241:

"Probably the most frequently quoted, and we think at times misquoted, case on the subject of corroboration of confessions is Daeche v. United States (C.C.A.) 250 F. 566, where the court spoke through Learned Hand, then District Judge. There the indictment was for a conspiracy maliciously to attack vessels in United States waters, with intent to despoil the owners of munitions, by attaching bombs to the sterns of the vessels in such wise that they would explode and destroy the vessels or disable them. The defendant confessed his part in the plan, and the question whether or not there was sufficient evidence of the *corpus delicti*—the agreement to attack the ships—independent of the confession, was raised. Judge Hand expressed his personal agreement with the point of view of Mr. Wigmore discussed *supra,* but said that he nevertheless felt obliged to recognize the rule as contrary. He stated:

" 'It must be conceded that there has been a very general concordance of judicial opinion in the United States that some sort of corroboration of a confession is necessary to conviction, and this concordance has extended to federal courts as well as elsewhere. U. S. v. Williams, 1 Cliff. 5, 28 Fed. Cas. [636] No. 16707; U. S. v. Boese (D.C.) 46 F. 917; U. S. v. Mayfield (C.C.) 59 F. 118; Flower v. U.S., 116 F. 241, 53 C.C.A. 271; Naftzger v. U. S., 200 F. 494, 118 C.C.A. 598;

Rosenfeld v. U. S., 202 F. 469, 120 C.C.A. 599. That the rule has in fact any substantial necessity in justice we are much disposed to doubt, and indeed it seems never to have become rooted in England. Wigmore, § 2070. But we should not feel at liberty to disregard a principle so commonly accepted, merely because it seems to us that such evils as it corrects could be much more flexibly treated by the judge at trial, and even though we should have the support of the Supreme Court of Massachusetts in an opposite opinion. Com. v. Killion, 194 Mass. 153, 80 N.E. 222, 10 Ann. Cas. 911. We start therefore, with the assumption that some corroboration is necessary, and the questions are to what extent must it go, and how shall the jury deal with it after it has been proved. The corroboration must touch the corpus delicti in the sense of the injury against whose occurrence the law is directed; in this case, an agreement to attack or set upon a vessel. Whether it must be enough to establish the fact independently and without the confession is not quite settled. Not only does this seem to have been supposed in some cases, but that the jury must be satisfied beyond a reasonable doubt of the corpus delicti without using the confessions, before they may consider the confessions at all. Gray v. Com., 101 Pa. 380, 47 Am. Rep. 733; State v. Laliyer, 4 Minn. 368 Gil. 277); Lambright v. State, 34 Fla. 564, 16 So. 582; Pitts v. State, 43 Miss. 472. But such is not the more general rule, which we are free to follow, and under which any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession. Independently they need not establish the truth of

the corpus delicti at all, neither beyond a reasonable doubt nor by a preponderance of proof. U. S. v. Williams, supra; Flower v. U. S., supra; People v. Badgley, 16 Wend. (N.Y.) 53; People v. Jaehne, 103 N.Y. 182, 199, 8 N.E. 374; Ryan v. State, 100 Ala. 94, 14 So. 868; People v. Jones, 123 Cal. 65, 55 P. 698.' [250 F. 566, at pages 571, 572]."

The Court also says, at page 243:

"In the instant case the *corpus delicti* is transportation of the vehicle in interstate commerce from the District of Columbia to Maryland knowing that it was stolen. The contention of the Government that the *scienter* is not a necessary element of the *corpus delicti* cannot be sustained. There is nothing criminal under the statute about transporting a vehicle across a state line unless the person transporting it knows it to be stolen. The law is well settled that the *corpus delicti* includes not only the body or fact of the wrong, in the sense of the death in homicide or the loss of the chattel in larceny, but also the criminal means by which the same came about. * * * It is to be noted, however, that in certain types of crimes involving *scienter* on the part of the accused it is not possible to separate, either conceptually or practically—that is in respect of the proof—the *scienter,* as an element of the *corpus delicti,* and the agency of the accused. So in the crime of receiving stolen goods knowing them to be stolen, and in the crime at bar, it is not possible to separate, either conceptually or practically, the element of guilty knowledge in the transportation and the element of agency of the accused as the

> criminal. But this cannot operate to diminish the duty of the Government to present evidence of both elements of the *corpus delicti* independent of the confession."

We would like to add to the above Court's reasons for asserting that the *"corpus delicti"* rule has a sound basis, a reason which the facts in this case so clearly illustrate.

A Chinaman accused of income tax evasion, and also accused throughout the trial, as we shall show of black market operations (R-2 p. 354; R-3 p. 647 and R-3 p. 971) was actually guilty of overdrawing his partnership account.

Special agents, possessing all the usual, and perhaps some unusual, zeal of prosecutors were allowed to testify over objection to their summarizations and characterizations of extrajudicial admissions. A sworn statement was also introduced. The prosecution rested its case. Let us stop at that point.

The accused is inarticulate, easily misunderstood. No effort had been made by the agents who took the statement to clarify its meaning. Do we need actual duress or coercion to demonstrate the danger of permitting conviction on such testimony alone?

It does not appeal to our ideas of justice—that, by such proof, the prosecution has established to a moral certainty and beyond a reasonable doubt that the accused is guilty.

Mr. Chan testified as a possible reason for his having made the statement upon which the prosecution

relies that he was "scared" or that he was "disgusted".

(R-2 p. 399, line 22 to p. 400, line 8.)

We do not wish to champion the morals of Mr. Chan in his use of partnership money to acquire the assets which he acquired in 1943-1946. Nor do we wish to exaggerate the wrong to the other partners. Appellant had put 30 long and unproductive years into this partnership. When the going was rough and the creditors were so demanding that a meeting of the partners had to be called, it was Mr. Chan who was called upon —not to make profits, but to prevent the partners from suffering that liability and assessment for liability which would have been necessary to pay off the $20,000 in debts then owed. After that he put in his own money into the partnership. He borrowed on his home, on his life insurance and it was his hand in the dike which kept the flood out. In 1941 most of the partners had left the employ of the partnership. Those who were on the stand stated they took no active hand in the management after that. The flood season was past. So Chan overdrew. Obviously he had no written authority perhaps no tacit authority to borrow these funds. He did borrow them.

It is not unnatural then that he would be "scared" and attempt to justify himself when questioned by government agents whose purpose in so questioning him never was made clear. It has been said admissions must be received with caution. The soundness of that rule becomes most important when self interest which

usually argues against false admissions, in any particular case argues in its favor.

This is another reason why Courts have said that evidence of extrajudicial admissions must be received with caution and why they cannot be the sole prop upon which the government's case depends.

The following cases have also asserted this rule.

In *Pines v. United States* (C.C.A. 8th Ct., Dec. 5, 1941), 123 F. (2d) 825, the defendant was convicted of falsely counterfeiting securities transported in interstate commerce.

In holding that the *corpus delicti* had not been established the Court says, page 829:

> "This, being the corpus delicti, could not be presumed, nor could it be established by extra-judicial declaration, confession or admission of the defendant. Tingle v. United States, 8 Cir., 38 F.2d 573; Ryan v. United States, 8 Cir., 99 F.2d 864; Gulotta v. United States, 8 Cir., 113 F.2d 683. The evidence shows that defendant admitted to peace officers that he had possession of the securities in Minneapolis in November, 1939, and that he borrowed an automobile from a Minneapolis party. It appears from the evidence that he had the automobile and the securities in his possession in Council Bluffs, Iowa, in November, 1939. Had there been evidence independent of defendant's admission that he had possession of these securities in Minneapolis, this would have been sufficient corroborative evidence that he transported or caused to be transported the instruments from Minneapolis to Council Bluffs.

Bruce v. United States, 8 Cir., 73 F.2d 972; Bennett v. United States, 70 App. D.C. 76, 104 F.2d 209. There was here, however, no evidence save his own admission that he had possession of these securities in Minneapolis, Minnesota, and there is therefore lacking a vital link in the chain of circumstances by which it is sought to establish the transportation in interstate commerce. The corpus delicti includes not only the body or substance of the crime, but also the criminal means by which it was committed. The corroboration is not sufficient if it tends only to support the admission. It must embrace substantial evidence of the corpus delicti, though it need not in itself be sufficient proof of guilt. Forte v. United States, 68 App. D.C. 111, 94 F.2d 236, 244, 127 A.L.R. 1120; Gulotta v. United States, supra."

In *Gulotta v. United States* (C.C.A. 8th Ct., July 24, 1940), 113 F. (2d) 683, the defendant was convicted of falsely swearing that he was a citizen of the United States. A conviction was based upon an affidavit of registration in which the defendant swore that he had been born in Louisiana in 1896 and was a citizen and also a written statement by the defendant before an agent of the Government in which he declared that he had been born in Italy in March 1896 of Italian parents and in which he also admitted that he fraudulently represented himself to be a citizen of the United States. The Court held, on page 685, that extrajudicial admissions or confessions were not sufficient to authorize a conviction of crime unless corroborated by independent evidence of the *corpus*

*delicti* (citing cases); that independent evidence need not be of itself sufficient proof of guilt but need only be a substantial showing which together with the admission establishes guilt beyond a reasonable doubt. The Court goes on to say, page 686:

> "But the rule requires some such independent evidence, and it is conceded by the government that the record is barren of all such extrinsic evidence in this case, unless a distinction be made between confessions and admissions."

The Court then goes on to hold that there is a distinction between a confession and an admission in a criminal case for some purposes but that no such distinction or execution is recognized applicable to the rule above stated. The Court also points out the criticism of the rule made by Professor Wigmore, page 686:

> "The efficacy of the rule, however, as a shield against the possibility that innocent persons may be convicted of crime on the basis of a false confession or admission induced by promise of immunity or coercion is fully demonstrated by recent decisions. White v. Texas, 60 S. Ct. 1032, 84 L.Ed. 1342, decided May 27, 1940; Chambers v. Florida, 309 U.S. 227, 60 S.Ct. 473, 84 L.Ed. 716; Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682; Forte v. United States, supra. If a false confession of guilt may be obtained from an innocent person by the use of coercion or flattery it is equally true that an admission of any element of the crime may also be obtained by the same means. On the principle that it is better for society that the guilty should occasionally

escape than that the innocent should be punished, exceptions should not be grafted upon long-established rules until their need has been clearly demonstrated.

"[8, 9] The rule that to warrant conviction of a crime both confessions and admissions must be corroborated by some independent evidence is illustrated in cases very similar to the present. Duncan v. United States, supra; Gordiner v. United States, supra; United States v. Golan, D.C., Pa., 24 F.Supp. 523; and see Martin v. United States, supra; Tingle v. United States, supra. Nor has the requirement of some independent proof as applied both to confessions and admissions been relaxed merely because the facts seemed to indicate that the disclosures had been voluntarily made by the accused. If coercion could be clearly shown confessions and admissions would not be admissible at all. Wilson v. United States, 162 U.S. 613, 16 S.Ct. 895, 40 L.Ed. 1090; Hardy v. United States, 186 U.S. 224, 229, 22 S.Ct. 889, 46 L.Ed. 1137; Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568; Ziang Sung Wan v. United States, 266 U.S. 1, 45 S.Ct. 1, 69 L.Ed. 131; Murphy v. United States, 7 Cir., 285 F. 801; 22 C.J. 301; 16 C.J. 628, 717."

A decision of this Court quoted in several of the cases above cited is *Gordiner v. U. S.*, C.C.A. 9th Ct. Jan. 7, 1920, 261 F. 910 where the defendant was convicted of wilfully failing to register under the Selective Draft Act of 1917. On the trial proof was made of statements made by the defendant expressing his age and stating that he was opposed to war and would

not register unless compelled to do so. There were also affidavits introduced made long before.

Held on p. 919:

> "In brief the whole case against the plaintiff in error rests upon his affidavits. Unless he was within the prescribed age, he committed no crime by failing to register. The fact that he was subject to registration cannot be established beyond a reasonable doubt by the contents of the affidavits. The judgment is reversed * * *"

In *Martin v. U. S.,* C.C.A. 8th Ct. April 9, 1920, 264 F. 950, defendant was convicted of wilfully transporting spiritous liquor in interstate commerce. Defendant was found with the liquor in his possession and when arrested told the officer he had brought it from another state. He had pleaded guilty in the county court.

Held: The evidence constituted an extrajudicial confession or admission which was not sufficient to authorize a conviction unless corroborated. Citing *Graff v. U. S.,* 257 F. 295; *Naftzer v. U. S.,* 200 F. 494.

We respectfully submit that under the facts as shown and these authorities the motion made by the appellant for a judgment of acquittal should have been granted.

Should we have rested our case at this point? Should we have satisfied ourselves with the comforting thought that the burden of proof never shifts, and that the prosecution must establish its case by proof

so convincing that reasonable minds could not differ as to the guilt of the defendant? We did not elect to do so.

Did the appellant when he took the stand supply any of the proof which had theretofore been lacking? Did any of his witnesses, or any of the documentary evidence do so? Did the prosecution in forcing the defendant to assume the burden of his innocence thereby cleverly cause the defendant to convict himself thereby curing the inadequacy of the plaintiff's case? Above we have reviewed what we believe to be all of the pertinent evidence in the case. Perhaps rspondent in its brief will find evidence which we have overlooked. We shall be interested to read it.

As we now understand the facts, the appellant has denied there was any dissolution of the partnership, has shown no fact which would indicate such a dissolution, many facts which give a complete picture of a continuity of business operation and ownership straight through until the years when dissolution actually took place. Other partners have corroborated the fact that nothing occurred in 1941 or at any other time until 1945 to change ANY interest. Minutes of meetings have been offered; written agreements have been introduced; letters inquiring about possible dates of interests have been introduced. All of the evidence showed that when a partner retired he was *then* paid his original investment. All the checks by which such payments were made are in evidence. None of them was issued in 1941, or 1942, or 1943, or 1944. All were

in 1945, 1946 and subsequently—all exactly as Mr. Chan testified and all exactly as his partnership returns filed show.

The case of the prosecution therefore, we submit, was no better at its conclusion than when the prosecution had rested.

In *Nicola v. United States* (C.C.A. 3d Ct., Aug. 9, 1934), 72 F. (2d) 780, the defendant was convicted of income tax evasion. A corporation mostly owned by the defendant had sold certain patents to another corporation, and a third corporation, the Point Improvement Company, of which the defendant was president, had been paid a commisison on this sale. The commission was returned by the Point Improvement Company as income and an income tax paid thereon. The tax payable by Nicola would have been higher and it was the contention of the Government that the defendant had falsely and fraudulently used the device of the corporation to save the difference between the higher and the lower return. The circumstantial evidence upon which the case was permitted to go to the jury in the *Nicola* case was not dissimilar to the circumstantial evidence upon which the prosecution relies in this case. In reversing the verdict and judgment of conviction and holding that the evidence was insufficient to justify a conviction, the Circuit Court of Appeals said, on page 786:

> " 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and

where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction.' Union Pacific Coal Co. v. United States, 173 F. 737, 740 (C.C.A. 8); Wiener v. United States, 282 F. 799, 801 (C.C.A. 3); Yusem v. United States, 8 F. (2d) 6 (C.C.A. 3); Ridenour v. United States, 14 F. (2d) 888 (C.C.A. 3)."

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**BALANCE SHEETS PREPARED TO SHOW INCOME TAX EVASION BY THE SO-CALLED "NET-WORTH EXPENDITURES" METHOD CAN ONLY BE USED WHEN THE TAXPAYER'S BOOKS AND RECORDS HAVE BEEN LOST OR ARE INADEQUATE.**

In the preparation of this case and this brief, appellant's counsel have examined many tax evasion cases (not all of which are relevant on their facts), and many cases where the so-called "net worth-expenditures" method has been used and discussed.

This method may be described briefly. The agent goes to the taxpayer and asks him to state at the beginning of the period what are his "cash on hand", "accounts receivable", "equipment", "inventory", in other words, his assets, and also what his liabilities are at the beginning of the period. Human nature being what it is, it is not probable that the unwary taxpayer at that point overstates his assets. Then the taxpayer is asked the same questions for each year of the period and is particularly questioned concerning his expenditures for, and acquisition of, assets. In this way the net worth and increase of net worth

is determined during each of the years, and by deduction and subtraction net income during each of the years is determined.

Now it is obvious that where there is a set of books showing the taxpayer's receipts and disbursements all during the period, this method, which is never any more accurate than the memory of the agent plus the memory of the taxpayer, is neither necessary nor proper. Where profit and loss statements can be prepared by an accountant the true and proper proof of income is through a profit and loss statement.

In many tax evasion cases it became impossible to create profit and loss statements, either because the taxpayer had never kept any books, or because his books were "phoney" or because they had been destroyed purposefully or otherwise. Almost invariably the early—and some later—tax evasion cases involved bootleggers, gamblers, gangsters and similar characters to whom the idea of books accurately reflecting their transactions was quite abhorrent.

So the "net worth-expenditures" method of proving income tax evasion became, as a matter of necessity, a means of bringing miscreants to justice where no other method could be used.

But its use is and must be limited to those cases where its use is necessary.

The prosecution apparently recognized, or at least paid lip service to this limitation in the testimony of Mr. Englund.

"A. We only use the net worth system when the taxpayer's books and records are inadequate and we are unable to interpret them because they lack information as to * * * certain figures."

(R-2 p. 168, lines 1-4.)

In our statement of fact (supra, pp. 43, 48, 59 through H-10) we have shown the facts regarding the adequacy of the appellant's books in some detail.

The picture shown by this evidence is one of a complete set of "single entry" books recording each day's transactions, all receipts and disbursements, all throughout this period. There are daily records in English and Chinese which between them are complete. All of them were handed over to the special agents of the government, and kept by them for a year. Mr. Chan admittedly offered every cooperation in aiding the government to understand them. The books are now in evidence and are before this Court. There is nothing haphazard about the way the books are kept nor any of the columns therein. They were fully explained at the trial. Each debit column is always in the same place, each credit column, likewise. Mr. Englund attributed the failure of the government agents, during the year when these records were in their possession, to use them, to the fact that the Chinese interpreter, Mr. Victor Chin, couldn't speak the dialect in which the books are written.

This preposterous statement is the most significant single fact in this case.

We have shown above that there is only one Chinese written language common to all spoken dialects. Mr. Victor Chin simply could not have made that preposterous statement to Mr. Englund.

He sat in the courtroom all during the trial to counsel the prosecution. He translated all of the letters and written agreements which the defendant introduced into evidence (presumably without any difficulty arising from dialect differences). He was not called as a government witness to confirm the fact that he could not read the Chinese books. As a matter of fact, he did read passages from them during the trial without any difficulty whatever.

How much credence can be given to the testimony of a person when relating what he claims the appellant told him either about the existence of a partnership or the true extent of his assets, when he makes such an assertion?

Not only were the daily transactions complete through these records, there were cancelled checks, absolutely complete excepting for one or two checks readily picked up by the bank statements which were also complete. All are now in evidence.

There wasn't a single missing receipt or disbursement.

Moreover, the appellant had an audit made by an accountant and this audit was given to the special agents. Not one relevant fact was given at the trial by anyone as to wherein the books and records of

the appellant failed to furnish the government with the information sufficient for the preparation of a statement showing the ACTUAL income which the appellant had received and all of his expenditures during all of this period.

From all the evidence before it the special agents of the Internal Revenue Department could have prepared profit and loss statements.

True, the special agent Englund testified to the conclusion that the "books were inadequate" but as shown, the "reasons" he ascribed were not reasons at all; they were excuses for the more convenient—the simpler method of attempting to set up a balance sheet on extra-judicial admissions, after the introduction of which *let the taxpayer prove himself innocent, if he can!*

The question then is this:

Where a small business using a single-entry system of recording its financial transactions, parts of which are in a foreign language, keeps full books and records and turns them over to the special agents of the Internal Revenue department, and offers full cooperation in the investigation of these financial affairs, may the special agents of the prosecution disregard such books completely and present its case solely upon a net worth-expenditures theory basing the balance sheets "built" thereunder wholly upon the claimed extrajudicial statements of the taxpayers, thus forcing the taxpayer to attempt to explain by

trying to make a jury of lay men understand wherein the plausible picture built up on conjecture, is wrong?

If the answer to this question by this Court is to be in the affirmative, then indeed the prosecution of cases of income tax evasion has reached a new and dangerous stage in its development threatening the very foundations of the constitutional rights of an accused.

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**THE NET WORTH-EXPENDITURES METHOD CANNOT BE USED WHERE THE BEGINNING NET WORTH IS BASED WHOLLY UPON EXTRAJUDICIAL ADMISSIONS OR IS OTHERWISE UNSUBSTANTIAL.**

We have shown above that the balance sheets prepared and submitted by the prosecution here were built without substantial exception upon hearsay—the statements which Mr. Englund said that the appellant had said to him were his assets. We have shown that the beginning net worth statement was almost wholly erroneous.

The cases which we have cited above to show that no criminal case can rest solely upon extrajudicial admissions (supra, pp. 95-111) are also authority for the same proposition that beginning net worth can not be so proven. Tax evasion cases are no different than other criminal cases.

The following cases are in point to the effect that a beginning net worth balance sheet being the foundation upon which all the rest of the net worth statements depend must be based upon solid fact.

In *United States v. Chapman* (C.C.A. 7th Ct., June 18, 1948), 168 F. (2d) 997, the defendant was convicted of income tax evasion for the year 1943. The Appellate Court found that the balance sheet created by the agents for the beginning of the period, i.e., December 31, 1942, had been taken from and was based upon the books and records furnished by the taxpayer (thus in that case they did not have the situation as we do here where the beginning balance sheet and "net worth" is taken wholly from the statements made by the taxpayer).

There is in this case an excellent statement by the Court, however, of the requisites of the beginning net worth statement. The Court says, on pages 1001 and 1002:

> "Appellant contends that, 'In a "net worth case," the starting point must be based upon a solid foundation and a Revenue Agent's statement of the defendant's oral admission or confession when uncorroborated is not sufficient to convict.' We fully agree with this statement of the law. However, we find no deviation from it in this case. The actual starting point here was the net worth as established by appellant's books and records. From these Loyd drew up a statement of appellant's assets and liabilities as of January 1, and December 31, 1942. According to his testimony, he showed these to appellant on at least two occasions and asked him if he had any other assets or liabilities, and appellant replied that those were all he had, and, upon specific inquiry as to whether he had any currency, cash on hand, besides an item of $2,375

> entered on his books, he replied that the records were substantially correct as to that, and he had no other cash with the exception of a little money in his pocket. We cannot agree with appellant's designation of this as an 'uncorroborated admission.' In the first place, we think the Government was entitled to expect that books furnished for examination into a taxpayer's fiscal affairs would be correct, and a verification of their accuracy can scarcely be called an 'uncorroborated admission.' "*

Another recent case is *Bryan v. United States* (1949), C.C.A. 5th Ct., 175 F. (2d) 223. Certiorari was granted by the United States Supreme Court in 338 U.S. 813, 70 S. Ct. 69, and we have not read the decision of that Court. The Circuit Court opinion shows the following: the indictment charged income tax evasion. The government, using the net worth-expenditures method, showed by 50 witnesses and documentary proof expenditures greatly in excess of the income reported. There were no books to rely upon. The evidence also showed capital assets increasing each year in proportion to the expenditures in excess of gross receipts reported. The government's beginning net worth was a nominal figure.

It was held that the beginning net worth was not accurately ascertained, that the "net worth-expenditures" method is only effective where the computations of beginning net worth at the beginning and

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*Is the government also entitled to expect that the books will be incorrect?

at the end can be accepted as being reasonably accurate.

Whatever may have been the proper application of the facts of that case to the rule stated, the rule itself is sound and has been settled.

In *United States v. Fenwick* (C.C.A. 7th Ct., Nov. 4, 1949), 177 F. (2d) 488, Helen J. Fenwick was convicted in the United States District Court, Southern District of Indiana, of income tax evasion for the years 1943 and 1944. At the trial the Government offered no evidence other than a "net worth-expenditures" balance sheet to show the evasion of income taxes. The Court says, page 489 and 490:

> "[1, 2] In such a situation we must keep in mind that the conviction can not stand unless there is proof of the corpus delicti, existence of which can not be presumed or established by an extrajudicial admission. The government must, by competent evidence, prove beyond reasonable doubt that the crime charged has actually been committed. Pines v. United States, 8 Cir., 123 F.2d 825, 829; Forte v. United States, 69 App. D.C. 111, 94 F.2d 236, 243, 127 A.L.R. 1120; Gordiner v. United States, 9 Cir., 261 F. 910, 912; United States v. Chapman, 7 Cir., 168 F.2d 997 at page 1001. In the latter case we said: 'Appellant contends that, "In a 'net worth case,' the starting point must be based upon a solid foundation and a Revenue Agent's statement of the defendant's oral admission or confession when uncorroborated is not sufficient to convict." We fully agree with his statement of the law.' In other words to justify the conviction, there must

be proof beyond reasonable doubt and exclusive of any express or implied extrajudicial admission by defendant, that defendant evaded some income tax. Gleckman v. United States, 8 Cir., 80 F.2d 394, 399; United States v. Miro, 2 Cir., 60 F.2d 58, 61; O'Brien v. United States, 7 Cir., 51 F.2d 193, 196. Inasmuch as there is no direct proof that defendant received income which he did not report, we must test the validity of his conviction by the rules enunciated in the cases cited to determine whether there is such proof of increase in net worth, irrespective of defendant's implied admissions out of court, as to justify a finding of guilt. Such proof, circumstantial in character, in view of the principles announced, must be such as will exclude every reasonable hypothesis except that of guilt. Evidence of mere probability of guilt, of course, is not sufficient."

The Court then proceeded to review the evidence in that case and showed that the Government's information as to beginning net worth was based entirely upon an examination of defendant's "cancelled checks, bank statements and miscellaneous memoranda." The Court says, on pages 490 and 491:

"[3] The weakness of the government's position, stressed by defendant, is the uncertainty of the propriety of the finding of defendant's net worth at the beginning of 1943. Of course, before the increased net worth method of proof is effective, the net worth of the taxpayer at the beginning of the tax year must be clearly and accurately established by competent evidence. Bryan v. United States, 5 Cir., 175 F.2d 223;

United States v. Chapman, 7 Cir., 168 F.2d 997, 1001; United States v. Skidmore, 7 Cir., 123 F.2d 604, 608. By this rule we must test the sufficiency of the evidence offered by the government to establish defendant's net worth at the beginning of 1943.

* * * * * * *

"* * * the evidence falls far short of proof that the property which the government agents assumed constituted all of defendant's net worth at the beginning of 1943, was in fact all of the property then owned by him. * * *

"[4] As we have said, when the government relies upon the circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion it must produce evidence that excludes all possible available sources of taxable income from which the increased net worth and the excess expenditures could have been derived. Thus in Bryan v. United States, 5 Cir., 175 F.2d 223, 225, the court said: 'The net worth expenditures method of establishing net income, sought to be applied in this case, is effective only if the computations of net worth at the beginning and at the end of the questioned periods can reasonably be accepted as accurate. Since * * * no claim of evasion is based upon the deductions from gross income reported by the Defendant, and since there is no evidence that the gross expenditures by the Defendant in any year were made entirely from gross income of the business operations in such year, it was essential for the Government to present evidence that excluded, or tended to exclude, all other available sources from which the additional funds

> expended could have been derived. If the Defendant correctly reported his gross income, then a very substantial part of the expenditures was obliged to have been made from funds other than such current income and from sources not covered by the returns or the records of the Defendant or included by the Government's computation of net worth. * * * the Government must rely almost entirely upon circumstantial evidence, that is to say, upon the circumstance of the expenditure of considerably more money in the years in question than the Defendant took in * * *. The evidence, being circumstantial, must exclude every reasonable hypothesis other than the guilt of the Defendant. * * * the case should not have been submitted to the jury since it did not exclude the hypothesis that the funds used in making some of the expenditures might have been from sources other than current business income.' This supports the decision of this court in United States v. Chapman, 7 Cir., 168 F.2d 997, 1001."

In this case, special agent Englund proceeded to go right down the list of all assets and liabilities stated in his balance sheet, and excepting where the appellant had stipulated to facts, the figures were based wholly upon hearsay (supra pp. 49-57).

In *United States v. Fenwick* (C.C.A. 7th Ct., Nov. 4, 1949), 177 F. (2d) 488, discussed supra, the Court further said on p. 492:

> "Remembering that the government has the burden of proof in a criminal case, that the burden never shifts to defendant, that circum-

stantial evidence must be of such character as to exclude every reasonable hypothesis except that of guilt, it necessarily follows that, when the government relies upon circumstances of increased net worth and expendtures in excess of reported income to establish income tax evasion, the basic net worth must be established. The defendant is not compelled to take the witness stand; he is not compelled to make proof that he is innocent, but he must be proved guilty by the evidence beyond all reasonable doubt, and where there is uncertainty as to whether all the assets of defendant are included in the government's computation of net worth, it follows that its computations can not be relied on. Essential proof of no other assets is the cornerstone of the evidence of the government; that cornerstone being faulty, the whole edifice is so weakened as to be undependable as proof of guilt beyond all reasonable doubt."

---

**CONCLUSION.**

The appellant was on trial for income tax evasion. The methods by which a conviction was sought and obtained have been subjected to critical analysis above. One further criticism has been reserved for this conclusion.

Repeatedly throughout the trial the suggestion was put before the jury that Mr. Chan had been guilty of black market operations.

In cross-examining the witness Swanston, Mr. Seawell said:

"Q. Would it affect your testimony if you had known he was investigated by the OPA for charging over ceiling prices? Would that affect your testimony—during the years 1943-'44? * * *

In other words, it wouldn't make any difference to you as to his reputation for truth, honesty and integrity if he did charge overceiling prices? Is that correct?

Mr. Pierce. I presume counsel is going to have evidence to back this up. Otherwise the statements are highly prejudicial.

The Court. That wouldn't be relevant."

(R-2 p. 354, lines 5-15.)

"Mr. Seawell. Q. Isn't it a fact that at that time you told him (Mr. Englund) that the $8,100.00 was included as it was in your return, you put it in the merchandise bought for sale, because you had been paying overceiling payments, and that is the way you desired to cover it up? Isn't that what you told Mr. Englund the first time he came in to see you, when you first saw him?

A. No, no.

Q. Didn't you tell him you had been buying over the ceiling and that is the only way you could cover it up?

A. No, I never did tell him that, sir.

Q. Or words to that effect, you told him you put it in there to cover the over ceiling payments?

A. No, I never told him * * * nothing like that.

Q. And didn't you have some conversation with him about buying over the ceiling?

A. No sir.

Q. You did buy over the ceiling?

A. No, sir.

Q. During the years 1943, 1944, 1945, and 1946 you were in the meat business, weren't you?

A. Yes, sir.

Q. Didn't you make offers to people in Sacramento to buy meat over the ceiling prices?

A. No, sir.

Q. Never did?

A. Never did.

Q. Are you sure of that?

A. Sure of that, yes."

(R-3 p. 646, line 22 to p. 647, line 25.)

To the witness Robinson:

"Mr. Seawell. Q. Did you ever hear that Jack Chan was engaged in black market operations in Sacramento?

A. No I never.

Q. Did you know that he was selling meat over the ceiling price?

A. No.

Q. Did you ever hear that he offered to buy meat from a number of persons in Sacramento for overceiling prices * * *" etc.

(R-3 p. 971, lines 12-21.)

There was not the slightest evidence in this record that Mr. Chan had been guilty of black market operations. No evidence was introduced, or attempted to be introduced that he had ever told anyone he had bought or sold overceiling. This was a deliberate attempt by the prosecution to arouse the jury's prejudice.

We realize that we did not object to these questions when they were asked. What good would it have done? The suggestion was before the jury when the question was asked; the answers were not damaging. No question of that kind can be recalled by objection sustained, or admonition. The objection but serves to emphasize the importance of the subject in the jury's minds.

The matter was urged on motion for new trial. Perhaps we should have demanded a mistrial.

Perhaps, on the other hand these questions and answers are not sufficient in and of themselves to justify a reversal upon appeal.

However, we believe that when this is added to the other facts now before this Court, they become highly significant.

One other factor should be mentioned in closing:

This case was tried over a period of nearly a month. Early in the trial the prosecution started to superimpose upon a black board the set of figures which are now in its Plaintiff's Exhibit 39. Later this same computation was handed to each juror and retained throughout the trial. Thus the jurors had this one piece of evidence before them to take home with them and to study—this one bit to the exclusion of all other items of evidence—for a period of twenty days.

True, following the precepts of the prosecution we prepared similar balance sheets and presented them during the latter days of the trial. But by that time

the following figures among others were indelibly fixed in the jury's minds.

Jack Chan's net worth 12/31/42 minus $762.78.

Jack Chan's net worth 12/31/46 $83,113.11.

Appellant tried to assume the burden—a burden which under the law he is not rightfully required to assume—of proving to a moral certainty and beyond all reasonable doubt that he was innocent.

He tried hard to assume that burden over a period of twenty days, while the trial was twice interrupted —once when a relative of one of the jurors, died, once while another juror simply walked out of the court—room and we stipulated to a verdict by eleven jurors.

We tried to make the jury understand all of the books and records and all the rather technical accounting matters. We put these books in evidence with whatever translations were necessary. We got them in evidence only over the strenuous objection of the prosecution.

We do not believe that the jury ever understood the books or the somewhat complicated testimony of the experts who tried to explain them. After months of study we have found it difficult to keep all of the details in mind ourselves.

We believe that the appellant in this case was not convicted of income tax at all; we believe he was convicted, first, of being a Chinaman, secondly, of having profited by black market operations, and thirdly of

failing to pay income tax on moneys overdrawn from the partnership.

We do not believe that the jury believed that the partnership had been dissolved. The evidence of such dissolution was too shadowy for credence. We don't believe that the jury cared whether the partnership had been dissolved in 1941 or 1948 or at all. We sincerely believe that all the jury ever saw after this long protracted trial was $83,113.31 of "net worth" in 1946.

And we strenuously contend that the reason why the jury got that erroneous and distorted picture is because the prosecution here was permitted to and did present a plausible but false case built entirely upon hearsay—a case which the painstaking presentation of facts could never break down.

Dated, Sacramento, California,
September 25, 1950.

Respectfully submitted,
MULL & PIERCE,
A. M. MULL, JR.,
F. R. PIERCE,
*Attorneys for Appellant.*

**(Appendix Follows.)**

# Appendix.

## Appendix

Defendants' Exhibit AA

**PALACE MARKET**

**BALANCE SHEET**

**For Years 1942 thru 1946**

| | 12-31-42 | 12-31-43 | 12-31-44 | 12-31-45 | 12-31-46 |
|---|---|---|---|---|---|
| ssets | | | | | |
| Cash on Hand | 1,000.00 | 1,000.00 | 1,000.00 | 1,000.00 | 1,000.00 |
| Cash in Safe | 2,000.00 | 2,000.00 | 2,000.00 | 2,000.00 | 2,000.00 |
| Cash in Bank | | | | | |
| Merchants Nat'l #1 | 550.32 | 1,775.21 | 245.49 | 5,051.99 | 6,438.10 |
| " " #2 | 29.26 | 3,550.74 | 426.53 | 1,449.76 | 3,263.62 |
| Capital National | | 4,040.71 | 1,264.57 | 2,794.28 | 3,591.52 |
| Accounts Receivable | 500.00 | 500.00 | 500.00 | 500.00 | 500.00 |
| Inventory | 500.00 | 500.00 | 2,500.00 | 1,000.00 | 1,000.00 |
| Equipment | 500.00 | 706.03 | 1,478.25 | 1,478.25 | 3,096.28 |
| Clearing Account (Other Partners) | | 937.73 | 1,558.30 | 2,209.99 | 2,589.23 |
| Clearing Account (Jack Chan) | | 1,806.08 | 19,734.81 | 27,073.13 | 36,058.80 |
| TOTAL ASSETS | 5,079.58 | 16,816.50 | 30,707.95 | 44,557.40 | 59,537.55 |
| abilities | | | | | |
| Clearing Account (Jack Chan) | 4,658.24 | | | | |
| Back Wages | 8,100.00 | | | | |
| Hip Hing Co. | 300.00 | | | | |
| TOTAL LIABILITIES | 13,058.24 | | | | |
| et Worth | *[7,978.66] | 16,816.50 | 30,707.95 | 44,557.40 | 59,537.55 |
| | | *[7,978.66] | 16,816.50 | 30,707.95 | 44,557.40 |
| INCREASE FOR YEAR | | 24,795.16 | 13,891.45 | 13,849.45 | 14,980.15 |
| Less Depreciation | | 70.00 | 147.83 | 147.83 | 309.63 |
| AXABLE INCOME OF PALACE MARKET (Exclusive of Partners Salaries) | | 24,725.16 | 13,743.62 | 13,701.62 | 14,670.52 |
| eginning Net Worth 1-1-43 | | | | deficit | 7,978.66 |
| nding Net Worth 12-31-46 | | | | | 59,537.55 |
| TOTAL INCREASE IN NET WORTH | | | | | 67,516.21 |

*Brackets Indicate a Negative Balance.

Defendants' Exhibit BB

**JACK CHAN**

***BALANCE SHEET FOR INCOME TAX PURPOSES**

**For Years 1942 thru 1946**

| | 12-31-42 | 12-31-43 | 12-31-44 | 12-31-45 | 12-31-4 |
|---|---|---|---|---|---|
| Assets | | | | | |
| Accounts Receivable | 3,600.00 | 3,600.00 | 3,600.00 | 4,100.00 | 500 |
| War Bonds | 243.75 | 1,350.00 | 412.50 | 412.50 | 41 |
| Auto | 450.00 | 1,100.00 | 1,100.00 | 1,100.00 | 1,100 |
| Personal Jewelry | 1,000.00 | 1,000.00 | 1,000.00 | 1,000.00 | 1,000 |
| Life Insurance (Cash Value) | 4,172.62 | 4,172.62 | 4,172.62 | 4,172.62 | 4,17 |
| Motion Picture Equipment | | | | | 62 |
| Home Furnishings | 500.00 | 705.00 | 980.83 | 980.83 | 98 |
| Home | | 6,767.42 | 6,767.42 | 6,767.42 | 6,76 |
| Lot | | | 100.00 | 100.00 | 10 |
| Improvements on Lot | | | 251.20 | 251.20 | 25 |
| Building | | | 57,724.43 | 57,724.43 | 57,72 |
| Improvements on Buildings | | | 644.00 | 644.00 | 1,23 |
| Back Wages for Partnership | 8,100.00 | | | | |
| Clearing Account for Partnership | 4,658.24 | | | | |
| Equity in Partnership | | 3,249.30 | 5,998.02 | 9,012.38 | 20,84 |
| Total Assets | 22,724.61 | 21,944.34 | 82,751.02 | 86,265.38 | 95,71 |
| Liabilities | | | | | |
| J. B. Johnson | 1,000.00 | | | | |
| Cal West States Life Ins Co. | 2,975.68 | | | | |
| Minn Mutual Life Ins Co. | 1,196.94 | | | | |
| Deficit in Partnership | 1,695.73 | | | | |
| Amount Due to Partnership | | 1,806.08 | 19,734.81 | 27,073.13 | 36,05 |
| Note Pay. Wm K Sherman | | | 35,000.00 | 25,000.00 | 20,00 |
| Total Liabilities | 6,868.35 | 1,806.08 | 54,734.81 | 52,073.13 | 56,05 |
| Net Worth, Jack Chan | 15,856.26 | 20,138.26 | 28,016.21 | 34,192.25 | 39,65 |
| | | 15,856.26 | 20,138.26 | 28,016.21 | 34,19 |
| Net Worth Increase | | 4,282.00 | 7,877.95 | 6,176.04 | 5,46 |
| Beginning Net Worth 1-1-43 | 15,856.26 | | | | |
| Ending Net Worth 12-31-46 | 39,656.43 | | | | |
| Total Increase in Net Worth | 23,800.17 | | | | |

Defendant's Exhibit CC

**JACK CHAN**

**COMPUTATION OF NET INCOME PER NET WORTH THEORY USING PALACE MARKET BALANCE SHEET AS A BASIS**

**For the Years Indicated**

| | 1943 | 1944 | 1945 | 1946 |
|---|---|---|---|---|
| able Income of Palace Market | 24,725.16 | 13,743.62 | 13,701.62 | 14,670.52 |
| ack Chan's Partnership Ratio | 50/250 | 50/250 | 55/250 | 195/250 |
| k Chan's Share of Profit | 4,945.03 | 2,748.72 | 3,014.36 | 11,443.01 |
| n's Salary as a Partner | 1,800.00 | 4,260.00 | 4,260.00 | 4,260.00 |
| income from Building | | 11.09 | 3,075.63 | 3,453.49 |
| orrected Personal Income | 6,745.03 | 7,019.81 | 10,349.99 | 19,156.50 |
| Less Amount Trfd to Wife | 3,372.51 | * | 5,174.99 | 9,578.25 |
| band's Share (Jack Chan) | 3,372.52 | 7,019.81 | 5,175.00 | 9,578.25 |
| orted on Income Tax Return | 3,384.00 | 4,912.89 | 5,805.63 | 7,349.09 |
| l Income per Net Worth Theory | | | | 25,145.58 |
| l Income Reported per Income Tax Returns | | | | 21,451.61 |
| Unreported Difference | | | | 3,693.97 |

oint Return filed for 1944.